

From Territoriality to Universality?

Jurisdiction, Expertise and the Politics of Humanity in International Law

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Contents

Chapter 1: Introduction	1
1. The Changing Contours of International Law: Inside/outside upside down!	1
2. The Politics of International Law	4
3. Of Reconstruction, Projects and Jurisdiction	10
3.1 Reconstruction	10
3.2 Projects	15
3.3 Jurisdiction	20
4. Content and Overview	23

Part I: Projects of (Inter)Disciplinarity

Chapter 2: The Boundaries of Disciplines and the Disciplines of Boundaries:

International Relations, International Law and the Politics of Interdisciplinarity	30
1. Introduction	30
2. Chicago and the Interwar Years: IL and IR as 'Social Science'	36
2.1 Frederick L. Schuman	38
2.2 Harold D. Lasswell	41
2.3 Quincy Wright	43
2.4 Interim Conclusion	50
3. International Law and the Mirror of Politics: On Realism, Positivism and the Production of Blind Spots	52
3.1 Morgenthau, Political Realism – and the Irrelevance of International Law?	53
3.2 Oppenheim, Legal Positivism – and the Elimination of Politics?	69
3.3 Interim conclusion	72
4. Liberalism and Moderate Constructivism: Interdisciplinarity as Colonialization	75
4.1 A Starting Point: Regimes	75
4.2 Of Agendas, Optics and Compliance: Imagining Interdisciplinarity	78
4.3 Legalization, Legitimacy and the Design of Institutions	86

4.3 Logics of Action, the Power of Human Rights and Moderate Constructivism	92
4.5 Interim Conclusion	103
5. From Interdisciplinarity to Counterdisciplinarity – and Back?	107
6. Conclusion: Jurisdiction and the Politics of Interdisciplinarity	121
Chapter 3: Constructivism, Critical Legal Studies and the Changing Contours of the Politics of International Law	126
1. Introduction	126
2. Radical Constructivism and International Law	130
2.1 Onuf.....	131
2.2 Kratochwil	138
3. Critical Legal Studies and International Law	146
3.1 Kennedy	146
3.2 Koskenniemi.....	154
4. Conclusion: From the Linguistic Turn(s) to the Historical and Social Preconditions of International Legal Argumentation	160
Part II: Projects of International Law and Politics	
Chapter 4: The Politics of Expertise and Technicalities in International Law	166
1. Introduction	166
2. Expertise in International Politics and Law: A historical sketch	172
2.1 ‘Ask Mr. League Expert’: Experts, Democracy and the League of Nations	173
2.2 From Functionalism to Epistemic Communities	177
2.3 The ‘invisible college of international lawyers’	181
3. Social Theory and Legal Expertise	185
3.1 Knowledge and Society	185
3.2 From a Sociology of Professions to a Sociology of Expertise (Abbott)	189
3.3 The Juridical Field and the Force of Law(yers) (Bourdieu)	191
3.4 Making Things Legal (Latour, Jasanoff).....	193
4. The Politics of Expertise in International Law	198
4.1 Is Expertise A-Political and Non-legal?	199
4.2 Managerialism, Fragmentation, Constitutionalisation	201
4.3 Critical Approaches and the <i>Politics</i> of Expertise.....	210

4.4 Experts and the Politics of Legal Technicalities and Jurisdiction	217
5. Conclusion	220
Chapter 5: The Concept of Jurisdiction: Between Territoriality and Universality	222
1. Introduction	222
2. Jurisdiction as Social and Political Practice.....	232
2.1 Jurisdiction as social practice: Ford.....	234
2.2 Jurisdiction and Politics: Kaushal	239
2.3 Jurisdiction as <i>Chronotope</i> (Valverde).....	241
2.4 Jurisdiction and (Postmodern) Legal Pluralism: Berman and de Sousa Santos	242
3. A Short History of Jurisdiction.....	245
3.1 Universal Jurisdiction(s), the Pope and the Holy Roman Empire.....	246
3.2 (Re)discoveries, <i>dominium</i> and the territorialisation of jurisdiction	253
3.3 Territorial jurisdiction, the nation state and the <i>Lotus</i> Case	267
4. Conclusion	285
Chapter 6: <i>How to Make an International Crime: Of Judges, Lawyers and Academics</i>	290
1. Introduction	290
2. The Emergence of Modern International Criminal Law, Lauterpacht and Crimes Against Humanity	299
2.1 Lauterpacht and International Legal Theory	302
2.2 Lauterpacht and International Criminal Law	308
3. The Revival of International Criminal Law, Cassese and International Terrorism.....	321
3.1 Cassese and International Legal Theory	325
3.2 Terrorism, Custom, Cassese.....	335
4. Conclusion: From Guantanamo to The Hague – Or, who judges Humanity?	358
Chapter 7: Re-Inventing Interventions: Legitimacy, International Criminal Law and the Politics of Imagination	367
1. Introduction	367
2. Kosovo, Legitimacy and the Production of Semantic Uncertainty	373
2.1 The first fully legalized conflict?.....	375
2.2 ‘Illegal but Legitimate’	381
2.3 The Production of Semantic Uncertainty.....	387

3. The Responsibility to Protect and the New Politics of Intervention: Making the legitimate legal?	391
3.1 The Politics of Principles: Sovereignty and Human Rights	391
3.2 The International Commission on Intervention and State Sovereignty...	396
3.3 The United Nations and the Responsibility to Protect: The Hybridization of the Intervention Discourse and International Criminal Law	404
4. Risky Interventions: Quantifying Humanity's Law and the Production of Temporal Uncertainty	412
4.1 'Materializing', 'Implementing', 'Mainstreaming', 'Operationalizing'	413
4.2 A Framework of Analysis: The Making of an Indicator	421
4.3 Risk, Global Legal Indicators and the Production of Temporal Uncertainty	430
5. Conclusion: Who Represents Humanity? Competing legitimacies, competing temporalities	450
Conclusion	453
Bibliography	459

Chapter 1: Introduction

1. The Changing Contours of International Law: Inside/outside upside down!

Since the end of the Cold War or so we have witnessed an increasing use and relevance of international legal and law-like concepts and vocabularies in world politics. From the field of development economics¹ to the regulation of global financial markets² to the control of climate change³ or the use of force and the application of violence⁴, it seems that today everything has to be framed with a touch of (international) law. At the turn of the century, this development has been famously described as the “legalization of world politics”, namely that “the world is witnessing a move to law” in more and more issue areas.⁵ Related processes such as, for example, a rapid expansion of the international judiciary (also coined: ‘judicialization’), which in turn is manifested in the proliferation and increasing relevance of permanent and non-permanent international courts and dispute mechanisms, have also been highlighted.⁶ In short, as one observer noted recently: “The big debates in world politics today are inseparable from international law”.⁷ This growth of international legal activity is widely identified with progress as it is

¹ See David Kennedy, ‘Law and Development Economics: Toward a New Alliance?’, in *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century*, ed. David Kennedy and Joseph E. Stiglitz (Oxford: Oxford University Press, 2013), 19–70. As Tor Krever observes, ‘since the early 1990s, and especially in the new century, law has taken centre stage in development thinking’, Tor Krever, ‘Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense’, *Third World Quarterly* 34, no. 1 (2013): 131.

² See Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press, 2011).

³ See Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), chap. 4.

⁴ See David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006).

⁵ Judith Goldstein et al., ‘Introduction: Legalization and World Politics’, *International Organization* 54, no. 3 (2000): 385.

⁶ See, for example, Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, 2013; Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); and Bernhard Zangl, ‘Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO’, *International Studies Quarterly* 52, no. 4 (2008): 825–54.

⁷ Ian Hurd, *How to Do Things with International Law* (Princeton: Princeton University Press, 2017), 1.

seen as an important 'building block' for global governance and a possibility to finally 'tame' international politics by 'speaking law to power'.⁸

Simultaneously to this more general turn *towards* international legal and law-like vocabularies, we can notice a shift *within* the vocabulary of international law itself. For this thesis three structural changes are of particular significance. *First*, the phenomenological growth and extension of legality, i.e. the spread of legal and law-like vocabularies, goes hand-in-hand with an increasing relevance of *international legal experts and expertise*. To speak of international *legal* expertise indicates that international law itself has become a field of expertise. On the one hand, this is facilitated by the growing complexity and technicality of the international legal discourse – something that touches also recent debates on the deformalization, bureaucratization and constitutionalisation of international law and is said to manifest itself, e.g., in the emergence of a global administrative law⁹; on the other hand, the international legal discourse has developed into various specialised discourses (such as, e.g., international humanitarian law, international human rights law and international criminal law) with distinct forms of expertise and distinct groups of experts – something that is addressed in the literatures on the pluralisation, compartmentalisation and fragmentation of international law.¹⁰

Second, as many observers notice, we are also witnessing a shift in the temporal structure of the international legal argument, i.e. in the *temporality of international law*. Prominent examples in this context encompass the question of anticipatory self-defence, such as in the Bush administration pre-emption doctrine, or the precautionary politics in the so-called 'war on terror'. What is common in these examples is a shift from the 'past-oriented' logic of traditional international law (and law in general) towards more 'future-oriented' logics in international law. International law has increasingly to deal with questions of what might happen in

⁸ See, for example, Bernhard Zangl and Michael Zürn, eds., *Verrechtlichung - Baustein für Global Governance?* (Bonn: Dietz, 2004). On attempts to 'speak law to power' see David Kennedy, 'Speaking Law to Power', *Wisconsin International Law Journal* 23, no. 1 (2004): 173–81.

⁹ Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, 'The Emergence of Global Administrative Law', *Law and Contemporary Problems* 68 (2005): 15.

¹⁰ I will address the literatures on the constitutionalisation, bureaucratization, fragmentation, pluralisation, etc. of international law in more detail in Chapter 4.

the future and is not limited to the evaluation of possible past and current wrongdoings anymore.

Third, and most important for this thesis, it is the rise of what Ruti Teitel has described as a “paradigm shift” towards “*humanity’s law*” (or “humanity law”).¹¹ Namely, where international law was for a long time characterized in the language of a voluntarist inter-state law, i.e. as a law “that governs the relationship between independent states”¹² – and nothing else –, it is now increasingly conceived in other terms: states, sovereign and with exclusive jurisdiction over their territory, are not seen – as it was the case with the ‘Westphalian order’ – as the ‘solution’ to international violence, imperial vision and alien rule anymore. It seems that we witness an opposing trend, as today states are increasingly portrayed as the ‘problem’ and, consequently, as something that needs to be ‘tamed’. Insight/outside upside down! As the new solution to this new problem a new international law is presented – a law where not states but human beings as persons and peoples are the main addresses, the ‘subjects’ and ‘objects’ of law.¹³ The new subjects of international law are, as Teitel notes, often “organized along affiliate ties (such as race, religion, and ethnicity) that extend beyond the state and even beyond nationality”.¹⁴ For Teitel, the rise of ‘humanity’s law’ reveals that the “normative foundations of the international legal order have shifted from an emphasis on state security – that is, security defined by borders, statehood, territory, and so on – to a focus on human security; the security of persons and peoples”.¹⁵ Moreover, as Teitel writes, “[h]umanity law is universalizing enough to offer a new legal and political subjectivity. This subjectivity is defined and shaped

¹¹ Ruti G. Teitel, *Humanity’s Law* (Oxford: Oxford University Press, 2011), 8 (emphasis added). Throughout this thesis I refer mainly to ‘humanity’ and ‘humanity’s law’. For a discussion of the similarities and differences of the concept of humanity vis-a-vis the neighbouring concepts mankind and human dignity see: Britta van Beers, Luigi Corrias, and Wouter Werner, ‘Introduction: Probing the Boundaries of Humanity’, in *Humanity across International Law and Biolaw*, ed. Britta van Beers, Luigi Corrias, and Wouter Werner (Cambridge: Cambridge University Press, 2014), 5–9.

¹² This is, of course, the classic formulation of the Lotus case: Permanent Court of International Justice, ‘The Case of the S.S. “Lotus”’, in *Publications of the Permanent Court of Justice: Collection of Judgments*, Series A, No. 10, 1927, 18.

¹³ This runs, of course, against traditional formulations à la Lassa Oppenheim’s: ‘Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law’. As a consequence, for Oppenheim, ‘individuals are never subjects but always objects of the Law of Nations’ Lassa Oppenheim, *International Law: A Treatise*, vol. I: Peace (London: Longmans, Green and Co., 1905), 18, 345.

¹⁴ Teitel, *Humanity’s Law*, 15.

¹⁵ Teitel, 4.

by the humanity concept itself, and is articulated and achieved through the multiplication of claims in diverse actors' struggles over access to courts and other institutions of global law".¹⁶ This shift towards 'humanity's law' materializes, according to Teitel, in particular in the rise of three – for a long time irrelevant – strands of international law, namely international human rights law, international criminal law and a restructuring of the law of wars (or international humanitarian law).¹⁷ In this regard, international criminal law, for instance, has developed its own international judiciary, encompassing ad-hoc tribunals, hybrid courts and the permanent International Criminal Court (ICC) in The Hague; 'rights' as 'human rights' have become, in the words of Duncan Kennedy, "universal legal linguistic units";¹⁸ and, in the context of international humanitarian law the discourse of international interventions has fundamentally changed as the for and against of interventions is not discussed in a vocabulary of 'order', 'national interest', 'balance of power', '*Realpolitik*' or 'security imperatives' anymore but increasingly of 'legality', 'justice' or through new – at least on the international level new – legal and law-like terms such as 'rule of law', 'legitimacy', 'self-determination', 'democracy', 'human rights' and 'responsibility'.

2. The Politics of International Law

Yet, as it was already the case with the literature on regimes in the 1980s or on global governance in the 1990s, the diagnosis of critical scholars at the intersection of International Relations (IR) and International Law (IL) still stands:¹⁹ even if the observation of the legalization literature that the 'world is witnessing a move to law' and that this also changes the structure of the international legal argument and the constitutive rules of world politics, a scientific positivist epistemology is

¹⁶ Teitel, 216.

¹⁷ Teitel, 4–5.

¹⁸ Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2006), 66.

¹⁹ As a matter of convenience, I follow Nicholas Onuf's suggestion that disciplines and fields of study will always be designated by Upper Case, their subject of study by lower case, Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989), 1. Nevertheless, it is important to note, and this applies more to IL than to IR, that the separation between academic fields and disciplines and their subject is never a sharp one. The relationship between both should rather be seen as co-constitutive.

poorly equipped to grasp the intersubjective ontology of its object(s) of study – and that as a consequence we should turn to interpretive methodologies instead if we want to understand and study the role and rule of and through law on a global level in a more promising way.²⁰ This thesis is located at the intersection of critical approaches in IR (mainly the more ‘radical’ strand of constructivism) and IL (mainly what developed from the critical legal studies movement). These literatures are sometimes also assembled under the term ‘politics of international law’.²¹

Broadly speaking, critical approaches in IR and IL point to the fact that law and politics are not isolated realms but that law and politics constitute each other. As, for example, Martti Koskeniemi states, it is wrong to assume that the ‘politics of international law’ would be “about international law *and* politics. The

²⁰ This was in particular the core argument by Friedrich Kratochwil and John Gerard Ruggie in the midst of the regime debate: Friedrich Kratochwil and John Gerard Ruggie, ‘International Organization: A State of the Art on an Art of the State’, *International Organization* 40, no. 4 (1986): 753–75. For a rearticulation of this critique with regard to the literature on ‘legalization’ see Kratochwil in Shirley Scott, Anne-Marie Slaughter, and Friedrich Kratochwil, ‘Legalization: Interpreting the Empirical Evidence’, *Proceedings of the Annual Meeting (American Society of International Law)* 96 (2002): 291–98; and, for global governance, see, for example, Ole Jacob Sending and Iver B. Neumann, ‘Governance to Governmentality: Analyzing NGOs, States, and Power’, *International Studies Quarterly* 50, no. 3 (2006): 651–72.

²¹ This thesis aims to contribute to discussions among critical scholars in both disciplines. Nevertheless, the point of departure of some discussions lies rather in the confines of IR than IL (in particular in Chapter 2). More generally: The term ‘politics of international law’ goes back to Martti Koskeniemi, ‘The Politics of International Law’, *European Journal of International Law* 1, no. 1 (1990): 4–32. For a discussion of different ways to conceptualise the ‘politics of international law’ see, for example, Andreas Fischer-Lescano and Philip Liste, ‘Völkerrechtspolitik. Zu Trennung und Verknüpfung von Politik und Recht der Weltgesellschaft’, *Zeitschrift für Internationale Beziehungen*, 2005, 209–49. There have been various attempts to substitute the ‘international’ in ‘international law’ through notions such as ‘transnational law’: cf. Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956); ‘transnational legal process’: cf. Harold Hongju Koh, ‘Why Do Nations Obey International Law?’, *Yale Law Journal* 106 (1997): 2599–2659; ‘transnational legal pluralism’: cf. Peer Zumbansen, ‘Transnational Legal Pluralism’, *Transnational Legal Theory* 1, no. 2 (2010): 141–89; ‘legal pluralism’: cf. John Griffiths, ‘What Is Legal Pluralism?’, *Journal of Legal Pluralism* 24 (1986): 1–55; and Sally Engle Merry, ‘Legal Pluralism’, *Law & Society Review* 22, no. 5 (1988): 869–96; ‘postmodern law’: cf. Boaventura de Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’, *Journal of Law and Society* 14, no. 3 (1987): 279–302; ‘global law’ Gunther Teubner, *Global Law Without a State* (Aldershot: Dartmouth, 1997); or ‘law and globalization’ Paul Schiff Berman, ‘From International Law to Law and Globalization’, *Columbia Journal of Transnational Law* 43 (2005): 485–556. Although I am sympathetic with many of these approaches as they point to the limits of the concept of ‘the international’ (as it, e.g., reifies the inside/outside distinction and focuses mainly on what happens between states), I will stick to this concept and follow attempts of ‘generalising the international’: Jenny Edkins and Maja Zehfuss, ‘Generalising the International’, *Review of International Studies* 31, no. 3 (2005): 451–72. In particular, to speak of ‘the international’ in terms of ‘world society’ (in a Luhmannian sense) seems to be a promising avenue, see Oliver Kessler, ‘World Society’, in *Routledge Handbook of International Political Sociology*, ed. Xavier Guillaume and Pinar Bilgin (Abingdon: Routledge, 2017), 101–10.

conjunctive form would suggest a meeting of two separately identifiable entities whose action upon each other would then be the subject of analysis”.²² For Koskenneimi, law and politics are instead only two sides of the same coin. As Koskenneimi explains, on the one hand, it is “impossible to make substantive decisions within the law which would imply no political choice”,²³ while, on the other hand, international politics is always embedded in international legal language as international law provides “the *conditions of possibility* for the existence of the ‘international’ [...]. If international law did not exist, political actors would need to invent it”.²⁴ This latter point mirrors also Fleur Johns’ formulation of studying international law as “the continual making and remaking of global political possibilities”.²⁵ Moreover, critical scholars in both fields leave behind the idea that it is possible and desirable to define *ex ante*, i.e. by a stipulative (working) definition, what (international) law ‘is’; instead, they understand (international) legality as a certain *practice*, which has to be reconstructed.²⁶ If one pursues this avenue, law becomes part of processes of sense and world making.²⁷ However, these processes of sense and world making do not come without rule, authority and power. This calls attention, on the one hand, to the “constitutive functions of law: the way in which law produces reality, symbolic orders, and power” and, on the other hand, it emphasises that “legal arguments are embedded in and reproduce deeper-lying social and symbolic structures that make certain argumentative moves look more acceptable than others”.²⁸ To study the ‘politics of international law’ in such a way requires, in the end, an inquiry of the “productive power of legal arguments” as well as to examine

²² Martti Koskenneimi, ‘Preface’, in *The Politics of International Law*, ed. Martti Koskenneimi (Oxford: Hart, 2011), v (emphasis in the original).

²³ Koskenneimi, ‘The Politics of International Law’, 31.

²⁴ Martti Koskenneimi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005), xiii (emphasis in the original).

²⁵ Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013), 1.

²⁶ Cf. Nikolas M. Rajkovic, Tanja E. Aalberts, and Thomas Gammeltoft-Hansen, ‘Introduction: Legality, Interdisciplinarity and the Study of Practices’, in *The Power of Legality: Practices of International Law and Their Politics*, ed. Nikolas M. Rajkovic, Tanja E. Aalberts, and Thomas Gammeltoft-Hansen (Cambridge: Cambridge University Press, 2016), 1–25. Additionally, by concentrating on practices of legality, the perennial question whether international law is really ‘law’ becomes irrelevant.

²⁷ For the classic formulation see Onuf, *World of Our Making*.

²⁸ Wouter Werner, ‘The Use of Law in International Political Sociology’, *International Political Sociology* 4, no. 3 (2010): 305.

the blind spots, biases, tensions, contradictions, paradoxes and mechanisms of exclusion being part of it.²⁹

To study the ‘productive power of legal arguments’, implies also mean to reformulate the concept of ‘legalization’ as the “process whereby things, problems, issues, and facts are made ‘legal’”³⁰ – of how the ‘international’ is “jurimorphised”.³¹ Such an understanding of ‘legalisation’ deals also with the “formation and transformation of boundaries”.³² Firstly, it draws attention on the shifting boundaries between ‘legality’, its oppositional concepts – being them ‘a-legality’³³ or different forms of ‘non-legality’³⁴ – as well as neighbouring concepts such as ‘legitimacy’.³⁵ To speak of ‘a-legality’, ‘non-legality’ and ‘legitimacy’ helps here also to overcome the simple dichotomy of legal/illegal. Secondly, it highlights the ordering dynamics and boundary conflicts between different vocabularies and strands of international law: classical public international law foreground the role of states as main subjects of international law and conceptualise the international as divided into national territories; international economic lawyers emphasise the role of central banks, multinational enterprises or currency flows and segregate the global between these entities; international criminal law (as other forms of ‘Humanity’s law’) highlights individuals (as victims, perpetrators or prosecutors) and is often accompanied by discussions over the notion of universal jurisdiction. These different strands of international law identify different ‘global’ problems and

²⁹ Werner, 305; see also Filipe dos Reis and Oliver Kessler, ‘Constructivism and the Politics of International Law’, in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 344–64.

³⁰ Oliver Kessler, ‘The Same as It Never Was? Uncertainty and the Changing Contours of International Law’, *Review of International Studies* 37, no. 5 (2011): 2166; see also Kessler, ‘World Society’, 108.

³¹ The term ‘jurimorphised’ goes back to Kyle McGee’s discussion of the way Bruno Latour conceptualises the ‘passage of law’. It describes the way the ‘various entities and agents at stake are semiotically re-figured’ when turned into law, Kyle McGee, ‘On Devices and Logics of Legal Sense: Towards Socio-Technical Legal Analysis’, in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: Edinburgh University Press, 2015), 64. See also my discussion of Latour’s approach to law in Chapter 4.

³² Werner, ‘The Use of Law in International Political Sociology’, 307.

³³ Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013); and Hans Lindahl, ‘A-Legality: Postnationalism and the Question of Legal Boundaries’, *The Modern Law Review* 73, no. 1 (2010): 30–56.

³⁴ Fleur Johns identifies various forms of non-legality: illegality, extra-legality, pre- and post-legality, supra-legality and infra-legality. See Johns, *Non-Legality in International Law*, 1.

³⁵ Cf. Filipe dos Reis and Oliver Kessler, ‘The Power of Legality, Legitimacy and the (im)possibility of Interdisciplinary Research’, in *The Power of Legality: Practices of International Law and Their Politics*, ed. Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (Cambridge: Cambridge University Press, 2016), 99–124.

translate them into certain solutions as they encapsulate also different causal, agentic, temporal or spatial understandings of the ‘international’. Importantly, they do not only coexist in isolation of each other but intersect and often struggle with each other.

Finally, this has important repercussions for the three structural changes of international law to which I pointed at the outset of this chapter. First, with regard to the proliferation and increasing relevance of *international legal experts and expertise*, critical approaches call attention to the fact that legal experts and expertise are part of sense and world making dynamics. Expertise is not conceived as something technical (in the sense of being neutral and a-political) anymore. For example, David Kennedy argues that international legal experts ‘translate’ problems into their vocabularies and offer, then, solutions on the basis of these vocabularies. Obviously these translations are never neutral or mere transpositions from one context into another – translations serve as sites of open mediation, rewriting and negotiation of boundaries. What we see is then the boundary work or management of boundaries of and through law. Hence, Kennedy conceptualises international legal experts as ‘people with projects’ or ‘people pursuing projects’ – and these people pursue different projects.³⁶ Here, the co-constitutive or “performative dimension of expert practice” comes to the fore: “expert work constituting the space of its own expertise”.³⁷ Second, the *temporalisation of international law* can then be understood as a struggle between different expert vocabularies and their related temporalities (often between legal norms and vocabularies of risk) – it is a struggle at international law’s temporal border about “how international law imagines, and helps to imagine, the future”.³⁸ These “legal imaginaries of the future” have in turn “serious consequences for the present”³⁹ – as they are a struggle between different “present futures”.⁴⁰ The

³⁶ David Kennedy, ‘The Mystery of Global Governance’, *Ohio Northern University Law Review* 34 (2008): 827–60.

³⁷ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016), 4.

³⁸ Mónika Ambrus, Rosemary Rayfuse, and Wouter Werner, ‘Risk and International Law’, in *Risk and the Regulation of Uncertainty in International Law*, ed. Mónika Ambrus, Rosemary Rayfuse, and Wouter Werner (Oxford: Oxford University Press, 2017), 5.

³⁹ Ambrus, Rayfuse, and Werner, 5–6.

⁴⁰ See Niklas Luhmann, ‘The Future Cannot Begin: Temporal Structures in Modern Society’, *Social Research* 43, no. 1 (1976): 130–52. I will take up this discussion in Chapter 7.

‘politics of international law’ can then be understood as a “politics of framing”.⁴¹ Moreover, this struggle transforms and blurs existing legal categories, creates new categories and makes new practices possible such as targeted killings in the context of the so-called ‘war on terror’ or practices of intervention for the sake of ‘humanity’. Third, critical approaches shed light to the *‘darker’ sides of global governance in general and ‘humanity’s law’ in particular*.⁴² To remind us of the ‘darker’ sides of ‘humanity’s law’ means that often well-intended schemes to improve the human condition come with non-intended side effects, blind spots, power dynamics and exclusionary mechanism. For instance, critical voices remind us that the notion of ‘justice’ in recent debates about international criminal justice is rooted in longstanding Western traditions of thought – thereby becomes a “universalization of western particularities”⁴³ – and can thus have problematic effects when applied in a non-Western context;⁴⁴ others call attention to the biopolitical effects of the recent inversion of the inside/outside dichotomy.⁴⁵

In general terms, the core argument of this thesis is that ‘humanity’s law’ does not only introduce new forms of subjectivity to the international legal discourse but also redescribes the politics of space and the politics of time in international law. It redescribes the politics of space, as ‘humanity’ does not work through a spatial logic of an already extended territory but rather through a notion of extending space. It redescribes the politics of time as ‘humanity’ challenges the traditional past-oriented temporality of international law and sets up the conditions of possibility to introduce a future-oriented temporality of a ‘humanity to come’. Importantly, we should not conceptualise the politics of space and the politics of time as independent of each other.

⁴¹ Ambrus, Rayfuse, and Werner, ‘Risk and International Law’, 5.

⁴² See Friedrich Kratochwil, ‘Legalism and the “Dark” Sides of Global Governance’, in *International Law-Making: Essays in Honour of Jan Klabbers*, ed. Rain Liivoja and Jarna Petman (Abingdon: Routledge, 2014), 39–56; and David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2005).

⁴³ Gurminder K. Bhambra, ‘Multiple Modernities or Global Interconnections: Understanding the Global Post the Colonial’, in *Varieties of World-Making: Beyond Globalization*, ed. Nathalie Karagiannis and Peter Wagner (Liverpool: Liverpool University Press, 2011), 59.

⁴⁴ For further discussion, see, for example, Sarah M. H. Nouwen, ‘Justifying Justice’, in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge; New York: Cambridge University Press, 2012), 327–51.

⁴⁵ Cf. Jens Bartelson, *Sovereignty as Symbolic Form* (Abingdon: Routledge, 2014).

The broader aim of this thesis is thus to reconstruct shifts in the structure of the international legal argument and world politics connected to the emerging 'humanity's law', in particular with regard to international criminal law (and to some extent the intervention discourse): how do traditional legal and political categories change? how are, for instance, images of spatiality, temporality and subjectivity shifting? how do different forms of international legal expertise struggle over discursive hegemony? how is then global authority, power and order redescribed?

3. Of Reconstruction, Projects and Jurisdiction

In order to boil these rather broad questions down and make the whole endeavour more feasible, I will rely on the logic of reconstruction as underlying logic of inquiry and use two guiding concepts: projects and jurisdiction. This will provide the methodological bedrock of this thesis. Let me briefly illustrate what I mean by reconstruction, projects and jurisdiction.

3.1 Reconstruction

This thesis follows the logic of *reconstruction* as its underlying logic of inquiry. As for example Benjamin Herborth has pointed out, the logic of reconstruction is usually contrasted to the logic of subsumption.⁴⁶ On the one hand, the logic of subsumption follows primarily the outline of a (scientific positivist) course in research design. These courses often start with establishing stipulative (working)

⁴⁶ Benjamin Herborth, 'Rekonstruktive Forschungslogik', in *Handbuch der internationalen Politik*, ed. Carlo Masala, Frank Sauer, and Andreas Wilhelm (Wiesbaden: Springer VS, 2010), 265–84; see also Oliver Kessler, 'Keynote: Reconstructive Methods and the Politics of International Law' (EISA Young Researcher's Workshop: (Re)Constructing Violence: Norms, Knowledge, and International Legal Discourse, Catania, 22 September 2015). The concept of reconstruction is part of the vocabulary of constructivism since its inception in IR. Indeed, the first paragraph of Nicholas Onuf's *World of Our Making*, where the term 'constructivism' is introduced to IR, reads: 'The point of this book is to reconstruct a self-consciously organized field of study, or discipline, called International Relations. To do so necessarily involves reconsideration of international relations as something to study. I use the term "reconstruct" deliberately, both because my goal is ambitious and because I am committed to a philosophical position [...], which I call "constructivism." In my view, people always construct, or constitute, social reality, even as their being, which can only be social, is constructed for them', Onuf, *World of Our Making*, 1.

definitions of core concepts and categories⁴⁷, operationalize these definitions then in order to make them measurable and then test different theories, variables and hypotheses against the empirical material (data).⁴⁸ This scheme serves as a pre-given ideal of how to conduct research. Moreover, it is connected with a progressive imaginary of science, i.e. as an enterprise of discovering more and more (hidden) scientific laws of the world and generating thus cumulative knowledge: the more we test and measure, the more we know. As this logic of inquiry is mainly concerned with the measurement of empirical phenomena (in order to make them suitable for theory testing), it becomes essentially *method-driven*. Method is hierarchically superior to theory, which in turn stands over empirics.⁴⁹ What becomes visible here is that theory and its object of study (understood in terms of the 'empirical') are clearly separated and the latter subsumed under the former; what also becomes visible is that, for example, the work on concepts and categories is limited to establishing (working) definitions at the outset of the research process – once this is done, it is assumed that the meaning of concepts and categories is fixed (no ambiguity, no indeterminacy) and empirical phenomena can be subsumed under them.

Yet, on the other hand, the reconstructive logic of inquiry does not start with the fixation of concepts and categories but rather start with asking what kind of concepts and categories are relevant in a given field. In other words, these concepts do not derive from abstract theorising in advance but through an engagement and problematization of the object of study at hand. In other words, this logic of inquiry is mainly *problem-oriented*. Moreover, the research process is a constant back and forth between theories, methodologies, methods and concepts. Here, in particular, methodology is important as it connects and translates

⁴⁷ See already Gottlob Frege: 'A Definition of a concept (of a possible predicate) must be complete; it must unambiguously determine, as regards any object, whether or not it falls under the concept': Gottlob Frege, *Translations from the Philosophical Writings of Gottlob Frege*, ed. Peter Geach and Max Black (Oxford: Basil Blackwell, 1960), 159.

⁴⁸ This kind of research design is introduced to students of IR mainly through the textbooks of Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton: Princeton University Press, 1994); and Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca: Cornell University Press, 1997).

⁴⁹ This goes hand-in-hand with a certain centre-periphery dynamic with regard to research practice. While method and theory is developed in the (Western) centre, the (non-Western) periphery is not seen as place of method and theory development but, at best, of data generation. For further discussion see Pinar Bilgin, *The International in Security, Security in the International* (London: Routledge, 2017), chap. 1.

between the various elements of research.⁵⁰ This does not mean that “deep theorising”⁵¹ is not possible; but it means that ‘absolute knowing’ is not attainable.⁵² Theories, methodologies, methods and concepts are part of the social fabric – science is a social activity – as there is no Archimedian point from where to derive them in a ‘neutral’ way – there is no incontestable ‘view from nowhere’.⁵³ As a result, theory and object of study are not perfectly separable. This implies also, as Jörg Friedrich and Friedrich Kratochwil remind us, that we must recognise in the end that “neither lofty theory nor clueless research activism can provide secure foundations for our knowledge” and that we should “instead seek knowledge that will enable us to deal with relevant problems and, ultimately, to find our way through the complexities of the social world”.⁵⁴ Scientific practice helps thus ‘to go on’ or in ‘muddling through’ the world and provides thus orientation in our daily lives.⁵⁵

Importantly, the work on concepts and categories is not done when they are ‘fixed’ as it is the case with the logic of subsumption. When following the logic of reconstruction, the work on concepts and categories can move into the centre of analysis. However, here the aim is not to ‘fix’ a concept and establish (or find) clear boundaries vis-à-vis other concepts. Instead, the goal is to ‘reconstruct’ how a concept is ‘used’ and what it ‘does’ in a specific context.⁵⁶ When we take the example of the concept of (international) law, the aim is not to ‘fix’ the meaning of (international) law – of what (international) law ‘is’ – but to inquire into the use and performative effects of (international) law. This implies also that concepts do not have pre-given meaning and clear boundaries but that their boundaries are

⁵⁰ Herborth, ‘Rekonstruktive Forschungslogik’, 262.

⁵¹ Felix Berenskötter, ‘Deep Theorizing in International Relations’, *European Journal of International Relations*, forthcoming.

⁵² Cf. Anne Orford, ‘In Praise of Description’, *Leiden Journal of International Law* 25, no. 3 (2012): 621.

⁵³ See, for example, Friedrich Kratochwil, ‘Of False Promises and Good Bets: A Plea for a Pragmatic Approach to Theory Building (the Tartu Lecture)’, *Journal of International Relations and Development* 10, no. 1 (2007): 1–15.

⁵⁴ Jörg Friedrichs and Friedrich Kratochwil, ‘On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology’, *International Organization* 63, no. 4 (2009): 726.

⁵⁵ Ludwig Wittgenstein, *On Certainty*, ed. G. E. M. Anscombe and Georg Henrik von Wright, trans. Denis Paul and G. E. M. Anscombe (Oxford: Basil Blackwell, 1969).

⁵⁶ This goes, of course, back to Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (New York: Macmillan, 1953); and John L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962).

always ‘fuzzy’ or “blurred”⁵⁷ and that the boundary work of concepts serves as place for political contestation.⁵⁸ To analyse concepts in such a way means also to reconstruct the use and performative effects of concepts over time, i.e. historically.

Such an understanding of reconstruction as logic of inquiry goes also hand-in-hand with what Anne Orford recently advocated as “praise of description”.⁵⁹ Following mainly Ludwig Wittgenstein’s later work and Michel Foucault, Orford argues that we should start our research process with reconstructing and problematizing (international legal) practices.⁶⁰ Citing Wittgenstein – “We must do away with *explanation*, and description alone must take its place”⁶¹ –, Orford points out that we should not look for the deep structures of language and search for underlying absolute truths. For Orford, such an account continuous to be ‘critical’ as it is still possible to ask questions with regard to rule, authority, power and mechanisms of exclusion. It does also not mean that we should abandon theorization and pursue instead a naked empiricism but it means that theorization works always in dialogue with a problem at stake. Instead of analysing deep

⁵⁷ Wittgenstein, *Philosophical Investigations*, para. 71. The question of whether the boundaries of concepts are fixed or fuzzy goes back to the controversy between Ludwig Wittgenstein and Gottlob Frege. Frege remarked, that ‘the concept must have a sharp boundary. If we represent concepts in extension by areas on a plane, this is admittedly a picture that may be used only with caution, but here it can do us good service. To a concept without sharp boundary there would correspond an area that had not a sharp boundary-line all round, but in places just vaguely faded away into the background. This would not really be an area at all; and likewise a concept that is not sharply defined is wrongly termed a concept. Such quasi-conceptual constructions cannot be recognized as concepts by logic; it is impossible to lay down precise laws for them. The law of excluded middle is really just another form of the requirement that the concept should have a sharp boundary. Any object Δ that you choose to take either falls under the concept Φ or does not fall under it; *tertium non datur*’: Frege, *Translations from the Philosophical Writings of Gottlob Frege*, 159. Wittgenstein answers: ‘Frege compares a concept to an area and says that an area with vague boundaries cannot be called an area at all. This presumably means that we cannot do anything with it.—But is it senseless to say: “Stand roughly there”? Suppose that I were standing with someone in a city square and said that. As I say it I do not draw any kind of boundary, but perhaps point with my hand—as if I were indicating a particular spot. And this is just how one might explain to someone what a game is. One gives examples and intends them to be taken in a particular way.—I do not, however, mean by this that he is supposed to see in those examples that common thing which I—for some reason—was unable to express; but that he is now to employ those examples in a particular way. Here giving examples is not an indirect means of explaining—in default of a better. For any general definition can be misunderstood too. The point is that this is how we play the game. (I mean the language-game with the word “game”).’: Wittgenstein, *Philosophical Investigations*, para. 71.

⁵⁸ This is the idea of treating concepts as ‘essentially contested’, William E. Connolly, *The Terms of Political Discourse*, 3rd ed. (Oxford: Blackwell, 1994).

⁵⁹ Orford, ‘In Praise of Description’.

⁶⁰ Orford uses the concept of practice rather in the way the more radical constructivists do. For a discussion of the limitations of the ‘practice turn’ within the more conventional constructivist camp in IR see also Oliver Kessler, ‘Practices and the Problem of World Society’, *Millennium* 44, no. 2 (2016): 269–77.

⁶¹ Wittgenstein, *Philosophical Investigations*, para. 109 (emphasis in the original).

structures, Orford suggests to follow Foucault and Wittgenstein and “‘to make visible precisely what is visible’ – and arrange ‘what we have always known’”.⁶² In concrete terms, for example, the mapping of discourses and language games can provide valuable insights as a map never perfectly mirrors a ‘world out there’ but represents always an act of abstraction as it orders the world in a specific way.⁶³ Additionally, if we understand mapping in a way as Orford does, it comes very close to what Wittgenstein once called ‘*übersichtliche Darstellung*’.⁶⁴ There have been difficulties to translate this term into English – it was either translated as “surveyable representation” or, better, “perspicuous representation”.⁶⁵ The concept of ‘perspicuous representation’ (*übersichtliche Darstellung*) is central in the *Philosophical Investigations* as it describes the aim of Wittgenstein’s grammatical investigations. The idea is to give a ‘clearer (over)view of the use of the words’ by ‘seeing connections’ (in the way Wittgenstein uses the term ‘family resemblances’) but without providing a systematic account of some deep structure of the grammar.⁶⁶ Put differently, it is a way of ordering our descriptions – of making them clearer and providing orientation in order ‘to find our way through the complexities of the social world’.

⁶² Orford, ‘In Praise of Description’, 618. The quote ‘to make visible what is visible’ is Foucault’s. For Foucault’s original statement (and a discussion of ordinary language philosophy) see Michel Foucault, ‘La Philosophie Analytique de La Politique’, in *Dits et écrits II, 1976-1988*, ed. Daniel Defert and François Ewald (Paris: Gallimard, 2001), 534–51. The quote ‘what we have always known’ is from Wittgenstein: Wittgenstein, *Philosophical Investigations*, para. 47. I will discuss the question of ‘depth’ and ‘surface’ with regard to the ‘linguistic turn’ and how it has informed critical scholars in IR and IL in more detail towards the end of Chapter 3.

⁶³ Orford, ‘In Praise of Description’, 618, 625. Similarly, Friedrichs and Kratochwil, ‘On Acting and Knowing’, 716. On the question of mapping legal discourse see also William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), chap. 6; and in international law see Kennedy, *A World of Struggle*, chap. 2.

⁶⁴ It is introduced Wittgenstein, *Philosophical Investigations*, para. 122.

⁶⁵ For further discussions on the translation of this concept see Marie McGinn, *The Routledge Guidebook to Wittgenstein’s Philosophical Investigations* (London: Routledge, 2013), 28–29. For an ‘application’ of it see Sybille Krämer, *Sprache, Sprechakt, Kommunikation: Sprachtheoretische Positionen des 20. Jahrhunderts* (Frankfurt: Suhrkamp, 2001).

⁶⁶ The whole paragraph is the following (in G.E.M. Anscombe’s translation): ‘A main source of our failure to understand is that we do not command a clear view of the use of our words.—Our grammar is lacking in this sort of perspicuity. A perspicuous representation produces just that understanding which consists in “seeing connexions”. Hence the importance of finding and inventing intermediate cases. The concept of a perspicuous representation is of fundamental significance for us. It earmarks the form of account we give, the way we look at things. (Is this a “Weltanschauung”?)’ Wittgenstein, *Philosophical Investigations*, para. 122.

Orford's 'praise of description' resonates also to some degree with Bruno Latour's research strategy of 'opening the black box'.⁶⁷ As Latour explains "blackboxing [...] refers to the way scientific work is made invisible by its own success".⁶⁸ To 'open the black box' means then to make the 'invisible visible', i.e. the invisible that is at the surface already, 'visible visible'.⁶⁹ In this thesis I use the strategy of 'opening the black box' various times in order to problematize and theorize concepts and practices, which are usually taken for granted (as they are perceived as 'neutral' and/or 'technical'), such as interdisciplinarity, expertise, law, international crimes, and, most importantly, jurisdiction.

3.2 Projects

I will do so by reconstructing *projects*. The concept of 'project' is around for some time and widely used among critical scholars in IR, IL and beyond. Examples abound: Friedrich Kratochwil describes processes, which are related to what has been described as 'legalization' at the outset of this chapter, by referring to the observation that "law has become one of the languages, if not already the most frequently used language, to name and tackle our political *projects*".⁷⁰ Somewhere else Kratochwil speaks of "the liberal political *project*", "the cosmopolitan *project*" or "the governance *project*".⁷¹ Or, anthropologist and globalization scholar Anna Tsing argues that "[g]lobalization is a set of *projects*".⁷² For international law, Martti Koskeniemi states:

⁶⁷ See already Bruno Latour, *Science in Action: How to Follow Scientists and Engineers through Society* (Cambridge, MA: Harvard University Press, 1987), 1.

⁶⁸ Bruno Latour, *Pandora's Hope: Essays on the Reality of Science Studies* (Cambridge: Harvard University Press, 1999), 304. To 'open the black box' does not mean for Latour to go 'behind the things' but is (semiotically speaking) an operation at the surface. In this regard, it also resembles Gilles Deleuze concept of 'unfolding'. See Gilles Deleuze, *The Fold: Leibniz and the Baroque*, trans. Tom Conley (Minneapolis: University of Minnesota Press, 1993). For a discussion of how Latourian scholarship uses the strategy of 'unfolding' in the analysis of law see François Cooren, 'In the Name of the Law: Ventriloquism and Juridical Matters', in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: Edinburgh University Press, 2015), 238.

⁶⁹ The main difference between Orford and Latour is that Latour is less interested in using this strategy for a 'critical' project and does not discuss questions of power and authority. In this regard, this thesis is more interested in the questions Orford tackles.

⁷⁰ Friedrich Kratochwil, 'A Guide for the Perplexed? Critical Reflections on Doing Inter-Disciplinary Legal Research', *Transnational Legal Theory* 5, no. 4 (2014): 542 (emphasis added).

⁷¹ Friedrich Kratochwil, 'Global Governance and the Emergence of a "World Society"', in *Varieties of World-Making: Beyond Globalization*, ed. Nathalie Karagiannis and Peter Wagner (Liverpool: Liverpool University Press, 2007), 266, 268, 275 (emphasis added).

⁷² Anna Tsing, 'The Global Situation', *Cultural Anthropology* 15, no. 3 (2000): 351.

“From Grotius to the International Criminal Court, international law has been a *project* carried out by international lawyers. It has been sometimes a religious, sometimes a secular humanitarian project, a project for order, civilization, peace, security, development, rule of law and so on. Most of the time it has been a project by which European and European-originated lawyers or intellectuals have advanced their universalist ideals so as to substitute new rules and institutions for the present political and diplomatic world”.⁷³

However, Koskeniemi points out that this observation is increasingly inadequate: where the discourse of international law seemed to encompass for a long time only one common project – namely international law itself –, the image of unity has been under pressure more recently. As Koskeniemi continues:

“In the last three decades, the profession has been marked by functional specialisation and political controversy. The emergence of new institutional regimes reflecting new priorities has been accompanied by the consolidation of distinct forms of expertise in ‘human rights law’ international trade law’, ‘international environmental law’, ‘international criminal law’, and so on. International law has developed through diffusion into distinct and contradictory *projects*”.⁷⁴

The idea that international law as a discipline is composed of various projects is echoed by David Kennedy as well. According to Kennedy disciplines are in general composed of

“people in concrete situations. In my image of the discipline, individuals have *projects* – which they pursue in, around and through the argumentative, doctrinal, and institutional materials the discipline offers. Sometimes these materials thwart or facilitate or redefine a *project*, sometimes the reverse, sometimes both. As a result, it is

⁷³ Martti Koskeniemi, ‘International Lawyers’, 2007.

⁷⁴ Koskeniemi, 4 (emphasis added).

surprising how often one can describe a disciplinary sensibility in a way which explores its elisions and contradictions, even its blind spots and biases, but which still somehow seems sympathetic to the *projects*, ambitions, and personalities who have constructed it, and may even be embraced by participants in the discipline itself as a helpful account of their sensibility”.⁷⁵

This dynamic is for Kennedy also generated as these people “pursue the *projects* of their hearts and heads”.⁷⁶ Moreover, Kennedy extends this conceptualisation. For Kennedy, not only disciplines but also international legal expertise on a more general level is constituted of, as he writes, “people with *projects*”⁷⁷ and “people pursuing *projects*”.⁷⁸

Although the language of projects is omnipresent in the writings of more critically inclined scholars, it is remarkable that it is rarely contextualised and problematized. Its ‘black box’ remains closed. A notable exception is Duncan Kennedy, who defines ‘project’ as follows:

“I use the word ‘project’ here as a term of art, a term of art that is also a fudge. A project is a continuous goal-oriented practice activity based on an analysis of some kind (with a textual and oral tradition), but the goals and the analysis are not necessary internally coherent or consistent over time. It is a collective effort, but all the players change over time, and people at any given moment can be part of it without subscribing to or even being interested in anything like all its precepts and practical activities. [...] It isn’t a project unless people see it as such, but the way they see it doesn’t exhaust what outsiders can say about it. Liberalism and conservatism are ‘projects of ideological intelligentsias,’

⁷⁵ David Kennedy, ‘The Disciplines of International Law and Policy’, *Leiden Journal of International Law* 12, no. 1 (1999): 14 (emphasis added).

⁷⁶ Kennedy, 13 (emphasis added).

⁷⁷ Kennedy, ‘The Mystery of Global Governance’, 847.

⁷⁸ David Kennedy, ‘Lawfare and Warfare’, in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 172 (emphasis added).

and so are modernism/postmodernism, leftism, and critical social theory".⁷⁹

In other words, the concept of project has the advantage that it does not force us to search for coherence, where no coherence may exist. Projects are never fully constructed yet construct our world.⁸⁰ Projects might constantly slip between the normative and descriptive – but this is not a problem.⁸¹ Projects are ‘fuzzy’ – and it might be that they are successful not despite of their fuzziness but rather because of it. As such they work as “social imaginaries”.⁸² What we get when we study the ‘politics of international law’ by concentrating on projects is a more dynamic and less static conceptualisation of politics: we become aware of the construction process of projects but also the way different projects struggle with each other. To inquire into the ‘politics of international law’ by reconstructing projects has two additional benefits.

First, projects can be studied in different contexts (globalisation, international law, expertise, etc.) and at different scales (e.g., globalisation can be studied as a project, but also different projects of globalisation; an academic discipline as such can be studied as a project, but we can also inquire how ‘people pursue projects’ within that disciplines). ‘Context’ or ‘scale’ is then nothing pre-given but part of a permanent negotiation process itself, which has to be reconstructed. This means also that I am less concerned with engaging in exercises of comparison but rather with questions of what happens if different scales and different contexts intersect, overlap, clash and hybridize.

⁷⁹ Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge: Harvard University Press, 1998), 6.

⁸⁰ Thus they resemble what Nicholas Onuf recently described as ‘moderate-sized dry goods’: Nicholas Onuf, ‘Constructivism at the Crossroads; Or, the Problem of Moderate-Sized Dry Goods’, *International Political Sociology* 10, no. 2 (2016): 115–32.

⁸¹ This is emphasised by Kratochwil when he writes: "Since politics is always about projects which are never complete and which constantly move between the is and the ought, its analysis cannot be reduced to the logic of law, to the structural constraints of the international system, to the economy of force, or to a historical trend", Friedrich Kratochwil, ‘Politics, Norms and Peaceful Change’, *Review of International Studies* 24, no. 5 (1998): 216.

⁸² The concept of ‘social imaginary’ goes back to Charles Taylor who defines it as follows: ‘By social imaginary, I mean something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking, rather, of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations’, Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004), 23.

Second, to reconstruct projects tackles also the agent-structure *problematique*. Here, the following longer quotation of David Kennedy is indicative:

“I am convinced that were we to understand the mutually constitutive relationship between professional practice and knowledge we would have displaced the agent/structure debate which has paralyzed so much of the social sciences when thinking about international affairs. Rather than agents in structures, we might come to see people with projects, projects of affiliation and disaffiliation, commitment and aversion, and with wills to power or to submission. We would find these people organized in disciplines, speaking with another in the vernacular perhaps of public international law or international economic law or constitutionalism. Their disciplines would have a history, an intellectual history, and an institutional and political history. Their knowledge would be less recipe than rhetoric. Their practice would often be best understood as assertion and argument, the vernacular of those arguments structured like any other language. Were we to pursue this approach, we would focus less on procedures or institutions, or even substantive norms and values. The constitution, if we could call it that, for global governance would be written in the disciplinary habits, including the habits of mind and patterns of argument, of people with projects operating with expertise”.⁸³

For Kennedy, to start with ‘people with projects’ is an elegant way to identify the agent-structure debate as being concerned with a pseudo problem (*Scheinproblem*). Yet, like nature/culture, mind/body, normative/empirical the question of agent/structure has been a constitutive *problematique* of (Western) modernity.⁸⁴ Reconstructing projects – and Kennedy explicitly relies on the

⁸³ Kennedy, ‘The Mystery of Global Governance’, 847.

⁸⁴ The framing of these *problematiques* in terms of binaries is of course already part of the project of modernity as it is based on one of the guiding principles of modern logics, namely the law of the excluded third (*tertium non datur*).

methodology of mapping projects⁸⁵ – helps to leave the ‘paralyzing’ agent-structure debate behind as it makes it possible to stop questioning whether agents determine structures or structures agents – or whether both are co-constitutive.⁸⁶ We simply do not have to ask whether projects are the product of some deep structure or the intention of agents. Instead, it becomes now the central task to reconstruct how causality, space, time, agency or subjectivity are imagined and conceptualised within a certain project. In the end, we have to ‘open the black box’ of projects and can thereby provide ‘perspicuous representations’ (*übersichtliche Darstellungen*).

3.3 Jurisdiction

Finally, this thesis is mainly concerned with a specific type of projects, namely projects of *jurisdiction* or as I also call them: *jurisdictional projects*. As this thesis has an entire chapter on the concept of jurisdiction (Chapter 5), I can be brief, here. The concept of jurisdiction is one of the fundamental concepts of every (international) legal discourse. However, it is hardly problematized, conceptualized and theorized; even ‘critical’ scholars started only recently and in a still very sporadic way to investigate the use, performative effects and history of jurisdiction. Reason for this could be that, on the one hand, the term is usually conceived as neutral, a-political and technical – a technicality of law *par excellence*,⁸⁷ and that, on the other hand, most attention is derived to its adjacent or complementary concept of sovereignty – jurisdiction seems to stand in the shadow of sovereignty. Yet, to ‘open the black box’ of jurisdiction is, as I hope to show in this thesis, a promising endeavour. It is promising as jurisdiction is, in the words of Asha Kaushal, the “labourer of law” and “threshold between law and non-law”.⁸⁸ In other words, jurisdiction is a boundary-drawing device. This means that to concentrate on jurisdiction, its struggles and disputes, helps us then to better capture the politics of boundary-drawing in (international) law. As a corollary, we

⁸⁵ See Kennedy, *A World of Struggle*, chap. 2.

⁸⁶ Kennedy locates the agent-structure problematique mainly in traditional systems theory. See Kennedy, 75–78. Yet another way out would be the modern systems theory of Niklas Luhmann.

⁸⁷ Indeed, Annelise Riles uses the example of jurisdiction when she introduces the studying of (legal) technicalities’ as a ‘new agenda’ to students of law. See Annelise Riles, ‘A New Agenda for the Cultural Study of Law: Taking on the Technicalities’, *Buffalo Law Review* 53 (2005): 973–1033.

⁸⁸ Asha Kaushal, ‘The Politics of Jurisdiction’, *The Modern Law Review* 78, no. 5 (2015): 759, 783.

should understand jurisdiction as a political and social concept.⁸⁹ Jurisdiction then concerns questions of rule, authority, power, order and governance.

In the discourse of international law jurisdiction has usually been equated with exclusive territorial jurisdiction. In mainstream accounts the politics of jurisdiction in international law is then formulated as partitioning and compartmentalisation of an already existing, i.e. already extended (in the sense of Cartesian *res extensa*), (territorial) space into jurisdictional realms. This thesis challenges this view. It does so by, for example, reconstructing the history of the project of exclusive territorial jurisdiction and thereby showing that this project is a rather new phenomenon and that, even in high modernity, we can detect loopholes in the architecture of exclusive territorial jurisdiction: exclusive territorial jurisdiction was never as exclusive nor as territorial as imagined; it can thus be conceived as an example of a 'social imaginary'. Moreover, it seems that the project of exclusive territorial jurisdiction has been contested more recently through the emergence of the discourse of 'humanity's law', particularly when it turns into discussions about universal forms of jurisdiction. What is important here is not the fact that 'humanity' might represent a new totality, but that it is extending. In other words, *I will propose a post-Cartesian concept of jurisdiction and argue that we should understand different projects of jurisdiction as extending – as something that spreads and only thereby creates its own conditions of possibility.*⁹⁰ *This means that there is no pre-fabricated jurisdictional space but every jurisdictional project fabricates its own space.*

To conceptualise jurisdiction in this way helps me to redescribe the concept in four ways. Firstly, it moves beyond the idea that jurisdiction is territorial, which was the underlying logic of modern statehood. Rather, we can grasp jurisdictional projects of humanity as extending by a non-territorial logic of space. Secondly, I will argue that we should leave a notion of jurisdiction behind, which is based on a Cartesian concept of space (i.e., space as something already extended) and, instead, understand jurisdictional projects as extending in space – and thereby extending

⁸⁹ This is the main argument of Richard T. Ford's seminal article: Richard T. Ford, 'Law's Territory (A History of Jurisdiction)', *Michigan Law Review* 97, no. 4 (1999): 843–930.

⁹⁰ That jurisdiction is extending could subsequently be understood as its performative effect.

space itself. Thirdly, the extension of jurisdictional projects is not restricted to space only but works also by extension of time and other modalities. For instance, conventional international criminal lawyers list four different principles (or dimensions) of jurisdiction *ratione loci*, jurisdiction *ratione tempore*, jurisdiction *ratione personae* and jurisdiction *ratione materiae*. Jurisdictional projects in international criminal law can use these different forms of jurisdiction as tools to regulate their extend. For instance, in Chapter 6, I will reconstruct how jurisdictional projects of international criminal law attempt to extend by means of international crimes (i.e., jurisdiction *ratione materiae*). We can even go further and broaden the use of the concept of jurisdiction into new areas and, in particular, ‘borrow’ it to analyse boundary conflicts. For example, I will follow Andrew Abbott’s suggestion to reconstruct conflicts between academic disciplines (Chapter 2) and between different groups of experts (Chapter 4) as struggles about jurisdiction.⁹¹ Fourthly, jurisdiction is not exclusive. Of course, this is hardly new for legal pluralists. Nevertheless, it is important to stress that jurisdictions do not only consist of spatial overlaps but also, for example, of temporal ones.

To sum up, methodologically this thesis follows reconstruction as its underlying logic of reconstruction. More precisely, it uses strategies such as ‘opening black boxes’ or to map and provide a ‘perspicuous representation’ (*übersichtliche Darstellung*) of discourses and language games in order to examine the politics of international law as a struggle of various jurisdictional projects in the context of ‘humanity’s law’.⁹² Such a methodologically take, helps me also to ask the following, more concrete, questions: how do different jurisdictional projects of ‘humanity’s law’ transform traditional legal and political categories? how do they change underlying imaginaries of spatiality, temporality and subjectivity? how do different experts, as ‘people with projects’, pursue their projects of ‘humanity’s law’? how do these projects intersect, overlap, hybridize and struggle with other projects of ‘humanity’s law’? how do these jurisdictional projects in the end rearticulate global authority, power and order?

⁹¹ See, in particular, Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: The University of Chicago Press, 1988).

⁹² To do so, this thesis relies mainly on library and Internet materials. It follows in this regard: Andrew Abbott, *Digital Paper: A Manual for Research and Writing with Library and Internet Materials* (Chicago: The University of Chicago Press, 2014).

4. Content and Overview

In order to approach these kinds of questions and reconstruct the politics of jurisdiction in international law and, here, in particular in what has been coined 'humanity's law', this thesis unfolds into two larger parts. The next two chapters, Chapters 2 and Chapter 3, are mainly concerned with disciplinary dimension of studying the 'politics of international law'. They focus on 'Projects of (Inter)Disciplinarity' (Part I). The remaining substantial chapters, Chapter 4 to Chapter 7, turn then to 'Projects of International Law and Politics' (Part II), which are rather located outside of academia. However, as we will see in various discussions, one should not draw the line between academic disciplines and their field of study as too sharp. Each of the chapters is presented here.

The next two chapters situate the thesis within academic debates in the intersection of IL and IR (Part I). Chapter 2 reconstructs different interdisciplinary projects between IR and IL and investigates thereby the politics of interdisciplinarity involved. The idea is not to give a stipulative definition of what interdisciplinarity means or should mean but to 'open the black box' of interdisciplinarity and to provide (by means of mapping) a 'perspicuous representation' (*übersichtliche Darstellung*) of the structure of the interdisciplinary argument between IR and IL. I identify four projects of interdisciplinarity with each of these projects being based on a different logic of interdisciplinarity but also (and this is of course connected) with different ways of, for example, relating law and politics.⁹³ Moreover, different interdisciplinary projects come with different hierarchies, biases, contradictions and exclusionary mechanism. In other words, interdisciplinary projects are also very much about jurisdictional struggles between (and within) academic disciplines. The first project of interdisciplinarity concerns the work of the scholars Frederick Shuman, Harold Lasswell and Quincy Wright at the University of Chicago during the interwar years. These authored contributed to both academic fields. However, in particular Lasswell and Wright referred permanently to an external third – the emerging behaviourist 'social

⁹³ Annelise Riles has done so, yet in a to some extent different way, with regard to interdisciplinary scholarship of law and anthropology: Annelise Riles, 'Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity', *University of Illinois Review* 3 (1994): 597–650.

sciences' and 'policy science –, which should be the blueprint for research in both disciplines. As a second project, I reconstruct the 'hidden' interdisciplinary dialogue or 'strange symbiosis' between political realism (IR) and legal positivism (IL), which should dominate the relationship between the two disciplines from the 1940s until the end of the Cold War. Although political realism and legal positivism seem at first sight incompatible with each other, as the possibility of their very existence is the denial of the 'other' and, therefore, seem antagonistic to interdisciplinary research; yet, a closer look reveals that they created a 'strange symbiosis' as they engage in a (hidden) division of labour *exactly* because their own condition of possibility is the denial of the other. The third project is provided by the more recent IR/IL literature, which is usually captured by terms such as 'institutionalism', 'liberalism' and 'liberal institutionalism' as well as by moderate constructivist research. Although emphasising 'dual agendas' and 'two optics' this project links the two disciplines in a hierarchical relationship where, e.g., IR offers method and theory while IL should provide enough cases to test them. Finally, I highlight how critical scholars in IR and IL address interdisciplinarity and in particular how critical IL scholars such as Jan Klabbers and Martti Koskeniemi started the project of 'counterdisciplinarity'. Yet, I will not leave it here and argue that the concept of translation could provide an interesting way for disciplinary linking as, if understood in a specific way, translation will not provide us with a tool to solve paradoxes, to eliminate power relations and to shed light into the blind spots of interdisciplinarity but it will enhance our vocabulary to make paradoxes, power relations and blind spots visible, analysable and criticisable; moreover, it points to the necessity to begin common investigations not by starting with a certain theory or method but rather by reconstructing a substantive puzzle or problem.

In order to further substantiate this last point, Chapter 3 provides an in-depth reconstruction of four critical projects at the intersection of IR and IL. These are the scholarly projects of Nicholas Onuf, Friedrich Kratochwil, David Kennedy and Martti Koskeniemi. In particular, I focus on their earlier writings and, in the case of Onuf and Kratochwil, on their legal writings. As I point out, all four projects have a strong interdisciplinary basis, which can be found mainly in the different guises of the 'linguistic turn' in philosophy and the social sciences. As a

consequence, the projects of Onuf, Kratochwil, Kennedy and Koskenniemi highlight legal ‘argumentation’, speak of the ‘rhetoric’, ‘grammar’ and ‘practice’ of international law and study law as ‘language’. Yet, although they share these similarities – similarities that make translation possible –, they nevertheless differ in the way they have taken the linguistic turn. Here, I draw on the idea to distinguish between a ‘performance model’ and a ‘two worlds model’ of language.⁹⁴ While, on the one hand, the ‘two worlds model’ ontologically divides speech (speaking) and language, where language ‘lies’ behind speech – and where speech becomes an articulation of a ‘deep grammar’ or of underlying ‘rules’ –, the ‘performance model’ rejects the idea that there is an ontological difference between speech and language and foregrounds instead ‘use’ and ‘performativity’. As I reconstruct, Koskenniemi and Onuf can rather be related to the ‘two worlds model’, while the positions of Kennedy and Kratochwil resemble rather the ‘performance model’. By mapping the similarities and differences between these important critical projects, I do not aim to elaborate a ‘joint discipline’ of critical scholars but rather develop a vocabulary that draws on different sources and is able to grasp recent developments of the ‘politics of international law’ and thereby provides a theoretical basis for discussions in the remaining chapters.

Chapter 4, the first chapter that is mainly concerned with projects outside of academia (Part II), inquires into the social preconditions of international legal argumentation by connecting the thesis to the recent interest in critical scholarship in the ‘politics of expertise’ in international law and beyond. In order to substantiate this, the chapter opens with a reconstruction of traditional accounts of expertise in both fields. Although taking different avenues, these accounts separate in the end between politics (power) and expertise (knowledge). However, such a separation between politics and expertise has been left behind by several authors in general social theory and also by more critical scholars in IR and IL. Moreover, international law has been conceptualised as a specific form of expertise. The chapter addresses then how different streams of critical scholarship in the intersection of IR and IL conceptualise international legal expertise. This links also to my earlier discussion of a ‘performance model’ and a ‘two worlds

⁹⁴ See Krämer, *Sprache, Sprechakt, Kommunikation*.

model' of language, as depending on the respective image of language critical authors either foreground such notions as 'competence', 'performativity' or 'form of life' when it comes to conceptualise international legal expertise. The chapter concludes with the suggestion that a focus on 'legal technicalities' – with jurisdiction being such a 'technicality' – might be a promising avenue to pursue in order to better grasp the 'politics of expertise' in international law and beyond.

I am now able to further reconstruct, problematize and theorize the specific 'legal technicality' of jurisdiction. In order to do so, Chapter 5 in two steps. First, I reconstruct the emerging critical scholarship on jurisdiction in various disciplines. Here, authors point to the fact that jurisdiction constitutes a social practice and has political implications, as it draws the boundary between law and its others; other voices highlight the spatio-temporal fixes of jurisdiction and link it to debates in legal pluralism. Second, I historicise the project of modern territorial and exclusive jurisdiction, which is one of the bedrocks of the modern nation state and hence the modern international. Here, I reconstruct how jurisdiction became territorial and exclusive and how its territoriality and exclusivity were always contested. More recently, it has been contested by the various streams of 'humanity's law'. In order to study the recent transformations associated with the emergence of 'humanity's law', I conclude this chapter by advancing a notion of jurisdiction that is non-territorial, post-Cartesian, multidimensional and non-exclusive. It is non-territorial as it acknowledges that jurisdictional projects of humanity extend by a non-territorial logic of space; it is post-Cartesian as it conceptualises jurisdictional space not as pre-given but jurisdictional projects as extending – and only thereby creating their jurisdictional space; it is multidimensional as jurisdictional projects often extend in non-spatial ways; and, it is non-exclusive as jurisdictional projects interact, intersect, overlap, clash and hybridize.

The remaining two substantial chapters illustrate by drawing on two exemplary case studies what it means to study jurisdictional projects of 'humanity's law' in such a way. Chapter 6 focuses on international criminal law, one of the main streams of 'humanity's law', and reconstructs how jurisdictional projects expand here by means of international crimes (concerning jurisdiction *ratione materiae*). Concretely, I study jurisdictional projects of two of the most

influential scholars in this field: Hersch Lauterpacht's successful project to make 'crimes against humanity' an international crime and Antonio Cassese's more recent, yet still not fully successful, project to make 'international terrorism' an international crime. To draw attention on the work of these projects helps to highlight how international legal expertise actually works, as both Lauterpacht and Cassese often 'changed hats' between academia and different roles outside the university sectors, in particular as judges and legal advisers. Moreover, the chapter foregrounds the relevance to look at more technical legal discourses (legal technicalities) and to 'open these black boxes' as the inclusion and exclusion of certain crimes has fundamental repercussions on questions of global authority and what 'belongs' to the international.

Chapter 7 moves then to the politics of jurisdiction in another stream of 'humanity's law', namely the broader discourse of intervention for humanitarian purposes (i.e., questions belonging to humanitarian international law). In particular, I explore the question of how jurisdictional projects in the context of the intervention discourse developed a future-oriented logic and how this logic is part of a number of episodes, which challenge the temporality of international legal argumentation. In order to study this, I reconstruct a 'chain of translation' from NATO's Kosovo campaign in 1999 until the proliferation of risk indicator projects in the context of 'implementation' strategies of the responsibility to protect within the United Nations – indicators to assess the risk that responsibility to protect situations might occur in the future. I interweave this reconstruction with a discussion of the production of uncertainty and ambiguity in international law and argue that attempts to 'fix' uncertainty and ambiguity by law, expertise and managerial tools produce new forms of uncertainty and ambiguity. In particular, I discuss the production of uncertainty, first, in the aftermath of the Kosovo bombings and, second, the adoption of the formula 'illegal but legitimate' (semantic uncertainty) and the intersecting temporalities of a rather past-oriented international law with future-oriented risk assessment tools in the context of the implementation of the responsibility to protect within the United Nations (temporal uncertainty). The chapter ends with a short discussion of the consequences for global ordering and the questions of who represents the

international and who humanity in a world of 'competing legitimacies' and 'competing temporalities'

The thesis ends with a brief Conclusion, which summarizes the thesis' main findings, brings its main threads together and provides some pointers for future research.

Part I: Projects of (Inter)Disciplinarity

Chapter 2: The Boundaries of Disciplines and the Disciplines of Boundaries: International Relations, International Law and the Politics of Interdisciplinarity

*"No topic has been the subject of more confusion in contemporary thought about international problems than the relationship between law and politics"*⁹⁵

*"Stories about fields emerge from within fields, they take weight but not density. Without them scholars would be less certain of their field's distinctive character and its place in the world of learning. This is the reason we hear simple stories, easy to learn and marked by a relative high degree of consensus. We might even expect such stories to take mythical propositions"*⁹⁶

1. Introduction

It seems, that since its institutional inception in the immediate aftermath of the Great War the academic discipline or field of IR is in a permanent crisis of identity. This goes so far as it is even unclear whether IR itself is a discipline at all, 'just' a sub-discipline of a larger political science or a loose field of inquiry.⁹⁷ Throughout its history one can identify a number of attempts to give IR its own disciplinary 'status, identity and project. In this context, the story of the 'great debates' is probably the most familiar one. According to this narrative, a first debate taking

⁹⁵ Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (New York: Harper & Row, 1964), 170.

⁹⁶ Nicholas Onuf, "'Tainted by Contingency': Retelling the Story of International Law", in *Reframing the International: Law, Culture, Politics*, ed. Richard Falk, Lester Edwin J. Ruiz, and R.B.J. Walker (New York: Routledge, 2002), 27.

⁹⁷ Cf. Ole Waever, 'The Sociology of a Not So International Discipline: American and European Developments in International Relations', *International Organization* 52, no. 4 (1998): 687-727; and Patrick Thaddeus Jackson, *The Conduct of Inquiry in International Relations: Philosophy of Science and Its Implications for the Study of World Politics* (London: Routledge, 2011), chap. 1; see also the recent forum in the journal *International Relations* on the disciplinary status of IR introduced by Félix Grenier, Helen Louise Turton, and Philipp Beaulieu-Brossard, 'The Struggle over the Identity of IR: What Is at Stake in the Disciplinary Debate within and beyond Academia?', *International Relations* 29, no. 2 (2015): 242-44. For an argument that IR should not be conceived as a discipline but 'just' a field of inquiry, see Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989), 14-27. For a similar and more recent statement, see Justin Rosenberg, 'International Relations in the Prison of Political Science', *International Relations* 30, no. 2 (2016): 127-53; and the forum on this article introduced by Ken Booth and Milja Kurki, 'Rethinking International Relations - Again', *International Relations* 31, no. 1 (2017): 68-70.

place in the 1940s between ‘idealism’ and ‘realism’ was decided in favour of the realists, liberated the field from the idealists’ daydreams of the inter-war years and provided IR with a view of the ‘reality’ of international politics as a permanent struggle for power; the second debate between ‘traditionalism’ and ‘behaviourism’ (some call the latter also ‘scientism’), which took place during the 1950s and 1960s, was ‘won’ by the ‘behaviourists’, made IR the vanguard of ‘American social science’ and helped to cut off its ties to Europe and ‘unscientific’ academic enterprises such as IL, philosophy, political theory or historiography; the inter-paradigm debate, starting in the 1970s, is sometimes mentioned as a third debate, which recovered liberal themes and attempted to fuse them with realism – the result was a debate without winners but, in the end, with a ‘(neo-neo) synthesis’ in the robe of a ‘rationalist’ vernacular, which became the new standard of science and thereby helped to get rid of Marxism (representing the third competing ‘paradigm’ at that time); and finally, mainstream IR scholars claim that a fourth debate between ‘scientific positivism’ and ‘post-positivism’ – or as some called it, between ‘rationalist’ and ‘reflective’ accounts (the latter used as a garbage can to assemble critical theory, feminism, post-structuralism and constructivism) – accounts was won by the ‘positivist’ side as it showed that ‘rationalists’ are able to engage with radical criticism and that ‘reflective’ scholars are incompetent, unable and unwilling to develop their own robust ‘research programme’.

Even though this picture of a cascade of successive great debates is, as the currently growing body of disciplinary historiography convincingly shows historically at least exaggerated if not even false, it nevertheless presents a powerful narrative to construct the discipline’s own identity and project.⁹⁸ It

⁹⁸ It is not possible to capture the literature on the historiography of IR in one footnote. However, see, for example, Miles Kahler, ‘Inventing International Relations: International Relations Theory After 1945’, in *New Thinking in International Relations Theory*, ed. Michael W. Doyle and G. John Ikenberry (Boulder, CO: Westview Press, 1997), 20–53; Peter Wilson, ‘The Myth of the “First Great Debate”’, *Review of International Studies* 24, no. 05 (1998): 1–16; Cameron G. Thies, ‘Progress, History and Identity in International Relations Theory: The Case of the Idealist-Realist Debate’, *European Journal of International Relations* 8, no. 2 (2002): 147–85; Ole Waever, ‘Still a Discipline After All These Debates?’, in *International Relations Theories: Discipline and Diversity*, ed. Tim Dunne, Milja Kurki, and Steve Smith, 3rd ed. (Oxford: Oxford University Press, 2013), 306–27; Ole Waever, ‘The Rise and Fall of the Inter-Paradigm Debate’, in *International Theory: Positivism and Beyond*, ed. Steve Smith, Ken Booth, and Marysia Zalewski (Cambridge: Cambridge University Press, 1996), 149–85; Ole Waever, ‘The Speech Act of Realism: The Move That Made IR’, in *The Invention of International Relations Theory: Realism, the Rockefeller Foundation, and the 1954 Conference on Theory*, ed. Nicolas Guilhot (New York: Columbia University Press, 2011), 97–127; Joel Quirk and

shows also that writing history is never a ‘innocent’ endeavour: it never excavates and describes historical ‘facts’ in a neutral way (i.e., history as the sequence of facts), but rather writing history means ‘producing’ and ‘doing’ history, i.e. ‘making’ and ‘performing’ historical facts.⁹⁹

This means also that writing history is usually connected to a ‘presentist’ purpose – a ‘present past’ instead of a ‘past past’¹⁰⁰ – and that to reconstruct how history is written often tells us more about our current societies as it does about past ones (e.g., in the context of IR the narrative of the ‘great debates’ helps to present and therefore legitimize one’s own project as the ‘winner’ or the ‘silenced victim’ of several successive debates).¹⁰¹ Although often forgotten, ‘presentism’ (i.e. the tendency to write history backwards) resembles exactly what the historian Herbert Butterfield, who was also one of the ‘founding fathers’ of the English school tradition in IR, convincingly described more than fifty years ago in his classic polemic as *The Whig Interpretation of History*:

“It is part and parcel of the whig interpretation of history that it studies the past with reference to the present [...]. Through this system of immediate reference to the present-day, historical personages can easily and irresistibly be classed into the men who furthered progress and the men who tried to hinder it [...]. On this system the historian is bound to construe his function as demanding him to be vigilant for likeness between the past and present, instead of being vigilant for unlikeness; so that he will find it easy to say that he has seen the present in the past, he will imagine that he has discovered a ‘root’ or an

Darshan Vigneswaran, ‘The Construction of an Edifice: The Story of a First Great Debate’, *Review of International Studies* 31, no. 1 (2005): 89–107; Brian C. Schmidt, *The Political Discourse of Anarchy: A Disciplinary History of International Relations* (Albany: State University of New York Press, 1998); Brian C. Schmidt, ‘On the History and Historiography of International Relations’, in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, 2nd ed. (London: Sage, 2013), 3–28.

⁹⁹ Cf. Mary Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (Chicago: The University of Chicago Press, 1998).

¹⁰⁰ Cf. Niklas Luhmann, ‘The Future Cannot Begin: Temporal Structures in Modern Society’, *Social Research* 43, no. 1 (1976): 130–52.

¹⁰¹ It was this insight that every description carries always a performative dimension that led already John L. Austin to abandon his earlier distinction between ‘constitutive’ (i.e. descriptive) and ‘performative’ utterances in favour of the latter, John L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962), chap. 6.

‘anticipation’ of the 20th century, when in reality he is in a world of different connotations altogether, and he has merely tumbled upon what could be shown to be a misleading analogy [...]. The total result of this method is to impose a certain form upon the whole historical story, and to produce a scheme of general history which is bound to converge beautifully with the present – all demonstrating throughout the ages the working of an obvious principle of progress, of which the Protestants and whigs have been the perennial allies while Catholics and tories have perpetually formed obstruction”.¹⁰²

The narrative of the great debates reveals also that IR is since its beginning as an academic discipline obsessed with the ‘science question’, namely to present its own endeavour as scientific and to delimit itself, on the one hand, from the ‘unscientific’ work of practitioners and journalists as well as, on the other hand, to survive among other neighbouring social science disciplines that, on their part, claim to be the ‘standard of science’ (economics in particular and, to some extent, psychology, sociology as well as – if conceived as different discipline than IR – political science).¹⁰³ This focus on conflicts between disciplines as institutional struggles resembles also, as I pointed out in the introductory chapter, what the sociologist Andrew Abbott called “jurisdictional conflicts” between different fields of expertise (professions, academic disciplines, etc.). These conflicts arise when different professions or disciplines start to “claim jurisdiction—that is, legitimate control—of a problem”.¹⁰⁴ According to Abbott, in order to capture these dynamics a sociological account of interdisciplinarity is indispensable.¹⁰⁵

¹⁰² Herbert Butterfield, *The Whig Interpretation of History* (New York: Norton, 1965), 11–12.

¹⁰³ On the ‘science question’ see, for example, Gerard van der Ree, ‘The Politics of Scientific Representation in International Relations’, *Millennium* 42, no. 1 (2013): 24–44; and Jackson, *The Conduct of Inquiry in International Relations*, 3–10. For a discussion of the relationship of IR and Political Science, see Rosenberg, ‘International Relations in the Prison of Political Science’.

¹⁰⁴ Andrew Abbott, ‘Jurisdictional Conflicts: A New Approach to the Development of the Legal Professions’, *American Bar Foundation Research Journal* 11, no. 2 (1986): 191; see also Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: The University of Chicago Press, 1988).

¹⁰⁵ For similar statements, see also Pierre Bourdieu, *Homo Academicus* (Stanford: Stanford University Press, 1988), Michel Foucault, *Archaeology of Knowledge* (London: Routledge, 2002), and Niklas Luhmann, *Die Wissenschaft Der Gesellschaft* (Frankfurt/Main: Suhrkamp, 1990). For a discussion whether the professional development of IR can be better understood by focusing on the institutional or external (i.e. exogenous events in world politics) context, see Schmidt, ‘On the History and Historiography of International Relations’.

Simultaneously to this turf building exercise, however, IR's identity was always tied to the idea that it is better equipped than other disciplines to conduct *interdisciplinary research*.¹⁰⁶ Thus, IR often saw itself often as an 'orchestrator' or 'meta-discipline', which collects and assembles bits and pieces from other disciplines whenever these bits and pieces seem to be relevant to conduct the study of international relations and world politics.¹⁰⁷ And, as 'real world problems' do not care about the boundaries of academic disciplines, 'interdisciplinarity' always seemed to be intrinsically valuable and, hence, presented and still presents until today a powerful symbolic capital for IR to promote itself, claim and extend its own jurisdiction in vis-à-vis its competitors.

Yet, the attempt to be disciplinary and interdisciplinary at the same time, leads us to a paradoxical situation, which is captured well (in the context of the field of economy and society) by the following quote of Andrew Barry, Georgina Born and Gisa Weszkalnys:

"The idea of discipline opens up a nexus of meaning. Disciplines discipline disciples. A commitment to a discipline is a way of ensuring that certain disciplinary methods and concepts are used rigorously and that undisciplined and undisciplinary objects, methods and concepts are ruled out. By contrast, ideas of interdisciplinarity and transdisciplinarity imply a variety of boundary transgressions, in which the disciplinary and disciplining rules, trainings and subjectivities given by existing knowledge corpuses are put aside or superseded".¹⁰⁸

With these preliminary remarks in mind the purpose of this chapter is to inquire into the paradoxes, possibilities and politics of interdisciplinary research in IR. However, I do not try to 'solve' the paradoxes and 'eliminate' the politics of interdisciplinarity by defining what 'interdisciplinary' means or should mean. As pointed out in the introductory chapter, to (re)define and hence anchor our

¹⁰⁶ This is probably due to the fact that, historically speaking, IR is a relative latecomer and that in its self-perception most of the turfs were already occupied by other disciplines.

¹⁰⁷ Of course, this image neglects the co-constitutive relationship between academic disciplines and 'their' object of study.

¹⁰⁸ Andrew Barry, Georgina Born, and Gisa Weszkalnys, 'Logics of Interdisciplinarity', *Economy and Society* 37, no. 1 (2008): 20–21.

concepts as if they were transhistorically and crossculturally valid is the way 'positivist' accounts of science conduct their inquiry. Instead, I follow a different path as I reconstruct different *interdisciplinary projects* as *jurisdictional projects*, which stand in competition with other projects. I show thereby how each of these projects produces different hierarchies and power relations between disciplines as well as different strategies to claim what the field of IR is or should be. In order to examine this, I use the relationship of IR to international law and the academic discipline of IL as a prism. Thus, to put it in another way, I will 'follow the law in IR'. *This approach reveals also that different projects of interdisciplinarity are intertwined with different images of law as well as different ways to relate law and politics.* To do so, I am guided by a number of interlinking research questions: How does the discipline of IR 'look' at IL, often perceived as its 'sibling discipline' or 'constitutive other'? How do different 'theories', 'schools', 'frameworks', 'approaches' and 'narratives' relate and link 'law' and 'politics'? Do they address the *problematique* of interdisciplinary research? If so, do they support or decline interdisciplinarity? How do they understand 'interdisciplinarity'?

To develop my argument, the chapter unfolds into four parts. The first part traces back interwar attempt of the three University of Chicago-based scholars Frederick Schuman, Harold Lasswell and Quincy Wright to study both disciplines IR and IL as a 'social science'. In the second part I will show how political realism in IR and legal positivism in IL were occupying several blind spots of the other and how this established a hidden and often overseen interdisciplinary project. The third part will introduce two rather recent interdisciplinary projects between IL and IR, which turn out to establish an imbalance between the disciplines in favour of the latter: on the one hand, the work of self-proclaimed institutionalist, liberal or liberal institutionalist scholars in both fields cumulating in joint projects such as the 'legalization of world politics' and attempts to produce blueprints for 'legitimate global governance institutions' for the future; and, on the other hand, the moderate constructivist literature on the 'power of human rights' and the idea that 'legitimacy' could serve as a distinct logic of action (beyond coercion and self-interest), which could also bridge the abyss between the two disciplines. In the fourth part I turn finally to contributions of critical scholars in IL and IR – and reconstruct how these scholars conduct the critique of the work of

liberal/institutionalist and moderate constructivist approaches as well as how they address the resulting asymmetry between IR and IL (in its most extreme form represented in the claim of some critical international legal scholars to foster the project of ‘counterdisciplinarity’ instead of interdisciplinarity). Yet, I will not leave it there and argue that intellectual cooperation can work on the basis of a shared problematique and, in particular, if we leave the narrow disciplinary confines behind and frame the exchange between different bodies of knowledge (which can be organised as disciplines) as ‘translation’, where ‘translation’ is understood as an open process that reflects upon its own power relations and silences: we are then able to move from an interdisciplinarity as subsumption to interdisciplinarity in terms of a reconstruction of shared problematiques. This discussion serves as a preparation to begin in the following chapter to outline how common research between critical scholars from IR and IL could look like.

2. Chicago and the Interwar Years: IL and IR as ‘Social Science’

A good starting point to study different interdisciplinary projects between IR and IL are several systematic attempts, which occurred at the University of Chicago from the 1930s onwards and had the aim order to make IR more scientific.¹⁰⁹

¹⁰⁹ Of course, I could have chosen another starting point. However, I do not attempt to write an all-encompassing history of all possible projects of interdisciplinarity between IR and IL. I actually do not believe that there could be one ‘natural’ starting point as different approaches and schools of thought highlight different origins. As Foucault reminds us: History is always a history of the present. Thus, the four interdisciplinary projects, which I discuss in this chapter, represent only a selection of interdisciplinary encounters between both disciplines (nevertheless, I claim that they represent important projects in the histories of both IL and IR; projects that repercuss until the present day). Another ‘natural’ starting point would have been the work of Alfred Zimmern, the holder of the first chair explicitly dedicated to IR, the Woodrow Wilson Chair for International Politics at the University of Wales, Aberystwyth, in 1919 (and thus the beginning of IR as an academic profession). Zimmern conceptualised IR as an ‘orchestrator’ between other, already more developed, disciplines such as international law and diplomatic history. A good example of Zimmern’s concept of interdisciplinarity – or as it was called at his time, ‘intellectual cooperation’ – is his inaugural lecture at the University of Oxford, where he was appointed Montague Burton professor in 1931. Here, Zimmern demarcates the scope of IR as follows: ‘But, to pick up once more the thread of our argument, if the teacher of international relations is concerned with the study of Modern Society, what exactly is his place in that field, and how is his subject to be related to those of his colleagues in kindred disciplines? Amid the group of studies devoted to the interpretation of modern society International Relations is only one, and a late-comer in the field. It is indeed legitimate whether, in the academic sense, it is a subject at all. Certainly, if the paradox may be excused, International Relations is not the only subject concerned with international relations. International judicial relations are already cared for by the international lawyers and international economic relations by the economists,’ Alfred Zimmern, *The Study of International Relations* (Oxford: Clarendon Press, 1931), 9. And he continues by stating that a scholar of IR cannot ‘hope to

Indeed, it was at the University of Chicago where in 1931 the first IR program in the United States was established.¹¹⁰ Among the most prominent early figures at Chicago were Charles E. Merriam (1874-1932), Frederick L. Schumann (1904-1981), Quincy Wright (1890-1970) and Harold D. Lasswell (1902-1978).¹¹¹ The common aim of these scholars was to establish political science – with IR as one of its branches – as a ‘social science’ or ‘policy science’. While Merriam should become famous as one of the initiators of the behavioural revolution in political science and through his attempt to turn political science into a ‘genuine science’ (meaning that it should discard historicism and orientate itself stronger towards the natural sciences), the latter three became in particular important for the ‘scientific’ development of international thought in the United States.¹¹² Throughout their careers Schuman, Wright and Lasswell contributed to both disciplines, IR and IL. Immediately after the Second World War, it was then the work of these Chicago-based authors, which should be among the primary targets of Hans Morgenthau’s polemic essay *Scientific Man vs. Power Politics*.¹¹³ In the remainder of this section I will reconstruct briefly important topics in the work of Schuman, Wright and Lasswell. In this section I will limit myself to present their work of the *Interbellum* as it reveals a specific understanding of interdisciplinarity, which could be described as an attempt to turn *both* IR and IL into a social science.

cover all territories assigned to him: but neither can the historian or the economist or even the international lawyer. His [the IR scholar’s] title may seem to be more comprehensive than theirs”, Zimmern, 12. What I do also not taken into account, and what has only recently been revealed, are the ‘racial origins’ of both disciplines. See for IR the excellent study by Robert Vitalis, *White Order, Black Politics: The Birth of American International Relations* (Cornell University Press, 2015); and for IL, see, for example, Martti Koskenniemi, ‘Race, Hierarchy and International Law: Lorimer’s Legal Science’, *European Journal of International Law* 27, no. 2 (2016): 415–29.

¹¹⁰ An interesting overview of the status of the field in the 1920s is provided by Parker Thomas Moon in his Syllabus on International Relations, published in 1925 on commission of the New York-based Institute of International Education. According to Moon, who focuses mostly on the US, the field was heavily fragmented as there is ‘a purely diplomatic approach to the subject; there is an “economic interpretation”; there is also a legal, and a political, and a psychological, and a sociological, and a geographical, and an historical interpretation’. However, as valuable as these interpretations may seem on a first view, for Moon, ‘international relations must be viewed as a whole’. It is the task of Moon’s Syllabus to bring together and integrate the different interpretation of the subject matter. The existence of ‘conflicting viewpoints’ notwithstanding, Moon argues that the ‘relevant facts should be presented impartially’. To do so, Moon lists more than 1200 publications contributing to the different strands of the literature on international relations (including also numerous references to the most important publications in IL). See Parker Thomas Moon, *Syllabus on International Relations* (New York: Macmillan, 1925), v, vii.

¹¹¹ Cf. Schmidt, *The Political Discourse of Anarchy*, 212.

¹¹² As I am concerned in this chapter with IR, I will not deal to a greater extent with the writings of Merriam.

¹¹³ Hans J. Morgenthau, *Scientific Man vs. Power Politics* (London: Latimer House Limited, 1947).

2.1 Frederick L. Schuman

In 1933, Schuman's textbook *International Politics: An Introduction to the Western State System* was published for the first time.¹¹⁴ The book went for seven printings and was the leading textbook in the field until the publication of Morgenthau's *Politics Among Nations*.¹¹⁵ In the words of Jack Donnelly, *International Politics* was "arguable the first realist international relations text".¹¹⁶ And according to Steven Bucklin, Schuman was together with Quincy Wright and Denna Flemming an exponent of Wilsonian internationalism – something that also showed how flawed the realist critique of the 'idealist' Wilsonians actually was as these authors incorporated several 'realist' themes in their writings.¹¹⁷

Schuman claims in *International Politics* that the "study of international relations has traditionally been monopolized by historians and lawyers" where the historians were occupied in collecting historical data and where the lawyers were concentrated on the "formal and legalistic dissections of the contemporary fabric of international organization—or 'international government', as some prefer to call it". However, according to Schuman there is a necessity to "escape from the limitations of the traditional approaches" that are trapped "by barren legal and historical concepts" and that are following the "blind alley of legalism" (in the case of law) or "fact gathering" (in the case of historiography) without "any unified scheme of interpretation". Instead, the study of IR should find a new home in the "new Political Science" that "as one of the social sciences, is concerned with the description and *analysis of power* in society—i.e., with those patterns of social contacts which are suggested by such words as rulers and ruled, command and obedience, domination and subordination, authority and allegiance".¹¹⁸ Based on this interest on the analysis of power in society, Schuman admits that his

¹¹⁴ Frederick L. Schuman, *International Politics: An Introduction to the Western State System* (New York: McGraw-Hill, 1933).

¹¹⁵ Oliver Jüterssonke, *Morgenthau, Law and Realism* (Cambridge: Cambridge University Press, 2010), 10.

¹¹⁶ Jack Donnelly, 'Realism and the Academic Study of International Relations', in *Political Science in History: Research Programs and Political Traditions*, ed. James Farr, John S. Dryzek, and Stephen T. Leonard (Cambridge: Cambridge University Press, 1995), 179.

¹¹⁷ Steven J. Bucklin, *Realism and American Foreign Policy: Wilsonians and the Kennan-Morgenthau Thesis* (Westport: Praeger, 2001).

¹¹⁸ Schuman, *International Politics*, xi–xii (emphasis in the original).

“approach is rather that of *Realpolitik*, characterized by Machiavellian detachment”.¹¹⁹ Although Schuman claims that he leaves the analysis of history and international law behind, both still play a prominent role in his more than 900 pages long textbook.¹²⁰ Schuman devotes for instance the entire first part of the book to the history (he speaks of “origins”) of the “Western State System” and later a chapter to international law (chapter IV).

For the purpose of this chapter, it is of particular interest to see how Schuman conceptualises international politics. For Schuman “international politics resolve about the competitive struggle for power and prestige between the units of the System”. And he continues by pointing out that two “habits and patterns” exist in international politics, which may be classified into “forms” and “forces”:

“Forms are structural and static. Forces are functional and dynamic. The study of Forms is the anatomy of international politics. The study of Forces is its psychology. Forms are laws, procedures, and institutions—the rules and tools of the game of international politics. Forces are the purposes, motives, and objectives which move the players to action. Forms shape the relations between States. Forces arise within States and determine the content of the policies behind the Forms. The two obviously interact upon each one another, and any sharp distinction between them must be somewhat artificial”.¹²¹

Hence, the relationship of international law and politics resembles the interaction of forms and forces. Schuman elaborates this further in his discussion of international disputes. Although international law may be able to solve legal disputes, it cannot solve political disputes: “International Law cannot itself supply solutions. Law is static and politics is dynamic. Political disputes can be settled only by readjustments of relationships of power”. Furthermore, on the

¹¹⁹ Schuman, viii.

¹²⁰ Recently, Schmidt however questioned the innovative character of Schuman’s work as it ‘advanced many of the same ideas that scholars in the field had been discussing for decades’, Schmidt, *The Political Discourse of Anarchy*, 213.

¹²¹ Schuman, *International Politics*, 120. That international politics constitutes a game is a topos, which runs through the entire textbook. This is already visible in the book cover, which is designed as a chess board.

international level the question whether something is “a political or legal controversy [...] is of necessity answered politically”.¹²² As we will see below in this chapter, Morgenthau takes a similar position with regard to the nature of disputes and the dynamics of international politics.¹²³

The asymmetric relationship between law and politics becomes also visible in Schuman’s image of international law. Even though Schuman rejects John Austin’s classic legal positivist statement that international law is not ‘law’ as it lacks an effective sanctioning mechanism, he argues that international law is what states – “sovereign, independent, and equal” – find “useful and expedient”.¹²⁴ In addition, as international law has “no [...] coercive power” it is not a “substitute for force in the relations between States, however much enthusiastic jurists would like to give it this function”. International law may help, however, to supply “a set of concepts of the legal definition of the subject matter” and to specify “what procedures are permissible, both in pacific and non-pacific settlements”.¹²⁵ Consequently, he defines international law in a (what we would today call) voluntarist way as “the body of rules and principles of conduct generally observed within the society of civilized States for the violation of which States are habitually held responsible”.¹²⁶ Hence, international law is law in a very specific way.

Schuman’s image of international law resembles also his rather sceptical view whether a reduction of violence in world politics is possible at all. For Schuman – and this should become one of the characteristic concepts of the Chicago scholars – “world unity”, i.e. the lack of “chaos” and “international anarchy” is, although highly desirable, nearly impossible to achieve. And here he has little hope that the League of Nations could help in this regard. For Schuman a modicum of hope lies only in a fundamental non-institutionalised shift of the *mentality* of the relevant actors of international politics, a shift conducted through

¹²² Schuman, 796. As we will see below, this resembles the line of argumentation of Morgenthau’s doctoral thesis.

¹²³ Something that also reperculated more recently in Koskeniemi’s mapping of IR as being based on a ‘culture of dynamism’ while IL should elaborate a ‘culture of formalism’, Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 494–508.

¹²⁴ Schuman, *International Politics*, 60–61.

¹²⁵ Schuman, 64.

¹²⁶ Schuman, 61.

a radical transformation of the underlying “myths” and “symbols”.¹²⁷ As we will see, it was Lasswell who further developed the ideas of “myths” and “symbols”; while it was Wright who was far more optimistic in the peace-creating force of the League of Nations. I will first turn to Lasswell.

2.2 Harold D. Lasswell

Harold Lasswell was probably the most creative proponent of the Chicago school during the interwar years. Lasswell studied political science under his mentor Merriam in the 1920s and obtained his PhD in 1926. He left Chicago in 1938 for an appointment at Yale Law School where he should become well known, alongside with Myres McDougal, as co-founder and central figure of the so-called ‘New Haven School’ of IL. This policy-oriented perspective on international law should become one of the most important streams of American IL after World War II.¹²⁸ However, it is interesting to see that Lasswell did not conduct comprehensive research on international law until he left for Yale. This may also anticipate the division of labour he should later obtain with McDougal, as Lasswell was the one responsible for the theoretical, methodological and conceptual foundations of the approach whereas McDougal, due to his in-depth knowledge of the subject matter, ‘applied’ it to international law.¹²⁹

Yet, it was during his time at the University of Chicago that Lasswell developed and sharpened his theoretical framework. In this context, Lasswell understood the project of the ‘New Political Science’ at the University of Chicago as an opportunity to integrate it with approaches and concepts from other emerging disciplines, in particular psychology. It was also during his time at the University of Chicago where Lasswell developed in the mid-1930s his famous definition of politics – something which occurred alongside with his first engagement with the

¹²⁷ Schuman, 828–830.

¹²⁸ For an introduction to the approach - co-authored by Michael Reisman, one of the leading figures of the later New Haven School – see: W. Michael Reisman, Siegfried Wiessner, and Andrew R. Willard, ‘The New Haven School: A Brief Introduction’, *Yale Journal of International Law* 32, no. 2 (2007): 575–82. For a more critical examination see Sandra Voos, *Die Schule von New Haven: Darstellung und Kritik einer amerikanischen Völkerrechtslehre* (Berlin: Duncker & Humblot, 2000).

¹²⁹ Voos, *Die Schule von New Haven*, 28.

subject matter of international relations.¹³⁰ At this time Lasswell was interested in how war propaganda was shaped by elites and experts and how these elites and experts could help to change public debates in order to make international politics less violent. Such an interest in experts and elites was not uncommon at this time as we can see, e.g., in the writings of Walter Lippmann and Alfred Zimmern.¹³¹ Lasswell assembles these different aspects in the opening paragraph of his *World Politics and Personal Insecurity*, where his famous definition of politics is presented:

“Political analysis is the study of changes in the shape and composition of the value patterns of society. Representative values are safety, income, and deference. Since a few members of any community at a given time have the most of each value, a diagram of the pattern of distribution of any value are the *élite*; the rest are the rank and file. As *élite* preserves its ascendancy by manipulating symbols, controlling supplies, and applying violence. Less formally expressed, politics is the study of *who gets what, when, and how*”.¹³²

As a result, the “analysis of world politics [...] implies the consideration of the shape and composition of the value patterns of mankind as a whole”.¹³³ In other words, Lasswell (and later the New Haven School) should use a very broad, almost all-inclusive, notion of politics.

Moreover, Lasswell turns to the idea of “world unity”, which I introduced in my discussion of Schuman already. For Lasswell the “stable world order” of ‘world unity’ is possible only if a “universal body of symbols and practices [is] sustaining an *élite*”. However, the “consensus on which order is based is necessarily nonrational”. It is important that the elites create a “world myth” – and this myth, in turn, “must be taken for granted by most of the population”. The analysis of

¹³⁰ On Lasswell’s contribution to IR in general, see Derek McDougall, *Harold D. Lasswell and the Study of International Relations* (Lanham: University Press of America, 1984). For an impressive reconstruction of Lasswell’s behavioralism from a constructivist angle, see Onuf, *World of Our Making*, chap. 7.

¹³¹ I will return to this early literature on experts and expertise at the outset of Chapter 4.

¹³² Harold D. Lasswell, *World Politics and Personal Insecurity* (New York: Whittlesey House, 1935), 3 (emphasis in the original).

¹³³ Lasswell, 3.

myth-making should become then the main task of the social science as it should “seek for the processes by which nonrational consensus can be most expeditiously achieved”.¹³⁴

Lasswell connects during the 1930s the idea of world unity only vaguely to international law. In *World Politics and Personal Insecurity*, for example, less than a page is devoted to the analysis of international law – the subject matter, which should become his central occupation later in his career. At this point of his career, however, Lasswell limits the discussion of international law to the idea that terms such as “law” and “World Legal Community”, as it was put forward by advocates of natural law (with regard to this literature, he cites *inter alia* the Austrian international lawyer Alfred Verdross), can work as a powerful “world symbol” in order to create a “world myth” and, subsequently, facilitate “world unity” and, finally, peace.¹³⁵ More generally speaking, the idea to connect international law and politics through ‘process’ will become later the core assumption of the New Haven School.

2.3 Quincy Wright

In contrast to Lasswell, who started to write on topics related to international law only after he had left Chicago, Quincy Wright worked on it throughout his whole academic career. Although Wright was one of the most influential figures in the history of IR (and IL), he is often forgotten today. Wright came to Chicago in 1923 where he was appointed a professor of political science at the age of only twenty-three and where he stayed for his whole career.¹³⁶ His permanent engagement with the two fields of international law and politics is well reflected by the fact that Wright served after the end of the Second World War as president of the *American Political Science Association* (APSA, 1948-49) and the *American Society of International Law* (ASIL, 1955-56) as well as inaugural president of the

¹³⁴ Lasswell, 237; see also his earlier discussion in Harold D. Lasswell, ‘The Problem of World-Unity: In Quest of a Myth’, *International Journal of Ethics* 44, no. 1 (1933): 68–93.

¹³⁵ Lasswell, *World Politics and Personal Insecurity*, 245–246.

¹³⁶ For a detailed analysis of Wright’s role in the international law during the interwar years, see Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge: Cambridge University Press, 2012).

International Political Science Association (IPSA, 1950-52). Wright has also been an editor of the *American Journal of International Law* and published an enormous oeuvre of approximately 1155 titles – including 99 articles and 55 book reviews alone in the *American Journal of International Law*.¹³⁷ According to Morton Kaplan, Wright was the “foremost theorist of international relations in the United states”¹³⁸ and Inis L. Claude claimed that “[i]f the academic field of international relations has a founding father, this man is surely Quincy Wright”.¹³⁹ More recently Bucklin called Wright “a dean among twentieth-century internationalists” and described him as “dedicated to what he called the Anglo-Saxon legal heritage of evolutionary change. His prescription declared that an enforceable international law was a self-correcting system.”¹⁴⁰

Although it is not so clear, as it is the case with the whole generation of interwar scholarship, whether the anachronistic and presentist label of ‘idealism’ really fits to his approach, he was definitely a defendant of a *scientific* approach to international affairs.¹⁴¹ What makes Wright so interesting for our discussion is the fact that he worked in IR as well as in IL and that he attempted to make both fields

¹³⁷ One of the few larger engagements with Wright in recent times is an article by Robert J. Beck. Here, Beck counts ‘21 books, 141 chapters in introductions to books of others, 392 journal articles, 123 encyclopaedia articles, 423 book reviews, and 55 published radio broadcasts’, Robert J. Beck, ‘A Study of War and An Agenda for Peace: Reflections on the Contemporary Relevance of Quincy Wright’s Plan for a “New International Order”’, *Review of International Studies* 22, no. 02 (1996): 122.

¹³⁸ Morton A. Kaplan, ‘Toward a Theory of International Politics: Quincy Wright’s Study of International Relations and Some Recent Developments’, *Journal of Conflict Resolution* 2, no. 4 (1958): 335.

¹³⁹ Inis L. Claude Jr, ‘The Heritage of Quincy Wright’, *Journal of Conflict Resolution* 14, no. 4 (1970): 461. Claude’s article is part of an honorary symposium assembled in the *Journal of Conflict Resolution* on occasion of Wright’s death. The symposium brings together appraisals from other leading figures in the field such as Karl W. Deutsch, J. David Singer, James Rosenau and Kenneth W. Thompson.

¹⁴⁰ Bucklin, *Realism and American Foreign Policy*, 2–3.

¹⁴¹ For example, Donnelly describes him as ‘eclectic but decidedly nonrealist’, see Donnelly, ‘Realism and the Academic Study of International Relations’, 179. For Emily Hill Griggs, on the other and, he was a realist *avant la lettre*, see Emily Hill Griggs, ‘A Realist before “realism”: Quincy Wright and the Study of International Politics between Two World Wars’, *Journal of Strategic Studies* 24, no. 1 (2001): 71–103; and for Trygve Thrøntveit neither realism nor idealism fit as categories, as he describes Wright as a policy-oriented ‘pragmatist’, see Trygve Thrøntveit, ‘A Strange Fate: Quincy Wright and the Trans-War Trajectory of Wilsonian Internationalism’, *White House Studies* 10, no. 4 (2011): 361–77. The problem to find an adequate label for scholars such as Wright may, again, be rooted in the ‘presentist’ way to write disciplinary history. Categories such as ‘liberalism’ or ‘realism’ were not used in the (self-)descriptions of IR scholars before the beginning of the Second World War. On the anachronistic use of the label ‘idealism’, its absence in the interwar discourse and its ‘invention’ by early ‘realist’ scholars in the 1940s, see Lucian M. Ashworth, ‘Where Are the Idealists in Interwar International Relations?’, *Review of International Studies* 32, no. 02 (2006): 291–308.

more scientific. Put differently, Wright observed from the legal angle IR (political science/social science) as he observed from IR (political science/social science) the analysis of law.

A good example for Wright's attempt to make IL more 'scientific' is a short report, which he filed in 1930 for the Social Science Research Council with the financial support of the Carnegie Endowment for International Peace. In this report Wright's task was to review, as already the title points out, the *Research of International Law since the War*.¹⁴² According to the report we can observe a general growth of the field of IL (assessing different areas of research such as the League of Nations as well as foundations, university degrees, publications, etc.) and it is suggested that the field should evolve in the future more towards *applicability*, which in turn is strongly identified with the *social sciences*. The report argues that applicability is important as the League of Nations and other international organisations, the foreign policy of many countries as well as 'the public' in general demand more technical assistance to solve the problems of international war and violence.

For Wright international law should be seen as a *technique* to solve these problems. As Wright puts it "[i]nternational law is a technique for dealing precisely with problems soluble only by action of more than one state, and consequently if the public is interested in such problem the role of international law necessarily enlarges".¹⁴³ Wright qualifies this statement a little bit when writing that the

"international lawyer, however, is not only a technician to assist the diplomat and statesman in the task of accomplishing results and making institutions run smoothly, important as that work is, his art and philosophy also give him a particular kind of insight into the tendencies and possibilities of social development. This may make him a useful political adviser, particularly when advance is guided relatively more

¹⁴² Quincy Wright, *Research in International Law since the World War: A Report to the International Relations Committee of the Social Science Research Council* (Washington: Carnegie Endowment for International Peace, 1930).

¹⁴³ Wright, 4–5.

by permanent international institutions and relatively less by accident of war and conquest”.¹⁴⁴

Wright’s description of the role of international lawyers, which is strongly oriented on the output of their work, is also resembled in his conceptualisation of international law. He describes international law as a “method, a philosophy, and a process” and substantiates this as follows:

“As a method it seeks to formulate current international relations as precisely as possibly, as a philosophy it seeks to formulate them as useful as possible, as a process it seeks to eliminate occurrences contrary to the most precise and useful formulations it can make.”¹⁴⁵

To accomplish the task of being ‘as precise as possible’, IL scholarship should become more scientific as “[r]esearch excludes vagueness, irrationality, and copying. Its essence is precision, logic, and originality”.¹⁴⁶ And, in order to make IL more scientific, it should stick more to the social sciences “not merely by utilizing their data, but also by employing their methods and philosophy”.¹⁴⁷ The idea, that IL should draw more on the social sciences (IR as part of political science constituted for Wright a social science), was popular among IL scholars in the interwar context (particular in the US) and it was probably articulated most openly and prominently by Manley O. Hudson, a professor at Harvard Law School, who claimed that IL itself should become an “international social science”.¹⁴⁸ Even if Wright did not go so far as he concedes to IL a degree of ‘relative autonomy’, the report concludes with the suggestion

“that international law can advance best by first giving efficient constructive aid to international institutions so that they can satisfactorily fulfil their functions of codification, legislation, and

¹⁴⁴ Wright, 6.

¹⁴⁵ Wright, 23.

¹⁴⁶ Wright, 23.

¹⁴⁷ Wright, 30.

¹⁴⁸ Quoted after Katharina Rietzler, ‘Fortunes of a Profession: American Foundations and International Law, 1910–1939’, *Global Society* 28, no. 1 (2014): 15; for a portrait of the contributions of Hudson and Wright during the interwar years, cf. Shinohara, *US International Lawyers in the Interwar Years*.

adjudication. This will mean careful analysis of the practical problems as they arise, both of procedure and substance. As a background for this the social sciences and contemporary politics should be more liberally drawn on than heretofore. They should determine the problems which are presently important, and should yield categories useful to the jurist when more precisely defined. The jurist should not stop there, however. He should seek constantly to formulate the concepts and systems. The law cannot live on philosophy alone, but it cannot live without philosophy. By envisaging the broadest tendencies of the times and moulding his systems toward them, the jurist may gradually shape the course of society itself.”¹⁴⁹

As I pointed out above, Wright was both, an IL scholar dealing with international relations and an IR scholar dealing with law. The latter orientation becomes visible for example in Wright’s leading role in a project dealing with the ‘causes of war’, which was initiated in 1927 by the Social Science Research Committee based at the University of Chicago and funded by the Rockefeller Foundation. The idea behind this project was to assemble insights with regard to the causes of war from different disciplines such as history, anthropology, psychology, sociology, economics, political science and international law.¹⁵⁰ Wright’s research in this project should culminate in the publication of his *magnum opus*, the two-volume *A Study of War*, which was published in its first edition in 1942 (with a second edition coming out in 1965).¹⁵¹ Yet, Wright had published some preliminary results already during the interwar years, in particular, in a smaller monograph, which carries the title *The Causes of War and the Conditions of Peace*.¹⁵²

The Causes of War and the Conditions of Peace is an important study as Wright explains here his framework and addresses the relationship of international politics and law. Let’s have a closer look at the line of the argument of

¹⁴⁹ Wright, *Research in International Law since the World War*, 36.

¹⁵⁰ Wright, 12.

¹⁵¹ Quincy Wright, *A Study of War*, 2 vols. (Chicago: University of Chicago Press, 1942).

¹⁵² Quincy Wright, *The Causes of War and the Conditions of Peace* (London: Longmans, Green and Co., 1935).

The Causes of War and the Conditions of Peace. For him peace and war are only two sides of the same coin as the identification of the conditions of peace is the flip side of the identification of the causes of war. Again, as it was the case for international lawyers, applicability is important. For “social scientists” it is not important to examine all elements involved in war and peace: “We want to know elements in the situation of either *predictive* or *control* value. Thus the conditions of peace which we actually wish to identify are those elements of the total situation during peace which we can effectively manipulate and which, if properly manipulated, will preserve the peace”.¹⁵³ For Wright the social sciences are perfectly suitable for such an endeavour of *social engineering*, as the social scientist occupies the perfect middle-ground between the journalist and the diplomat – both being too *practical* and too ‘close’ to the object of study which hinders them to elaborate generalisations –, on the one hand, and the philosopher and historian – both working only *theoretical* and lacking applicability –, on the other: “The social scientist seeking to retain contact with both the practical and theoretical workers, centers attention upon the isolation of measurable or at least recognizable factors, useful for predicting, or capable of manipulating for controlling the future”.¹⁵⁴ Wright’s method is in particular informed by comprehensive historical inquiries, which he subjects to further statistical analyses from time to time.

But, what are exactly the ‘conditions’ and ‘causes’, according to Wright? Wright identifies four conditions of peace (and their absence or inadequacy are equated with the four causes of war). The conditions are (1) “a desire for peace in the human population superior to all hatreds”; (2) “an organization of world community adequate to restrain conflicts”, (3) “the realization in international relations of a system of law intolerant of violence except as a legally controlled instrument of exclusion”; (4) “the continuous application of peaceful techniques for presenting extreme departures from equilibrium among the material forces in the state system”.¹⁵⁵ Similarly one can look at these conditions from other angles: (1) is about “public opinion and propaganda” (the psychological and public opinion point of view); (2) deals with “international organization and procedures” (the

¹⁵³ Wright, 1–2 (emphasises in the original).

¹⁵⁴ Wright, 19.

¹⁵⁵ Wright, 3–6.

sociological and organizational point of view); (3) centres around “international and constitutional law” (the legal point of view); (4) is concerned with “armaments and the balance of power” (the technical and military point of view).¹⁵⁶ For Wright all four conditions of peace are linked to each other. This signifies that, for instance, the field of international law cannot be studied in isolation. As he puts it, especially law

“and organization are clearly related [...]. Law and organization may indeed be looked upon as but objective and subjective aspects of the same thing. *Law is the society’s policy as recorded, classified, pigeon-holed, and susceptible of study. It is the analysis by which a society systematizes its interests.* Organization is the society’s policy as effected in the day to day functioning of institutions, the formulating, giving and carrying out of orders. It is the coordination by which society realizes its interests. *Law is then a society’s intellect and organization is its will*”.¹⁵⁷

Moreover, according to Wright, “law must be hostile to violence” and it must be an instrument to abolish the violent behaviour of states.¹⁵⁸ Wright argues that there have been two important developments since the Great War, which are the League of Nations and the Kellogg-Briand Pact; and he suggest that the organizational structure of the international level should be that of a ‘world federation’: “The federation is something of a compromise between the balance of power and the empire [...]. It seeks to organize authority in *international matters*, not in *all matters*, in a central representative body”.¹⁵⁹ For Wright the League of Nations can become this body.¹⁶⁰ However, Wright points out that the League of Nations had to struggle in recent time (he is writing in 1935), as it has become the arena for a conflict between *law* and *politics* – between supporters of a conception of the League arguing that it should be more legalistic in order to guarantee a

¹⁵⁶ Wright, 21.

¹⁵⁷ Wright, 73 (emphasis added).

¹⁵⁸ Wright, 86.

¹⁵⁹ Wright, 95.

¹⁶⁰ In other words, Wright can certainly be seen within the broader pragmatic ‘move to institutions’ in the first half of the twentieth century. On the ‘move to institutions’, see David Kennedy, ‘The Move to Institutions’, *Cardozo Law Review* 8, no. 5 (1987): 841–988.

higher degree of independence of its member state (the position of, e.g., the United States) and supporters of an antagonistic conception, who demanded a higher degree of political flexibility in order to give more power to the League (the position of, e.g., Japan).¹⁶¹ Wright is in support of this second position and argues that the League “must become universal” in order to transcend the struggle between law and politics. This kind of universality should not only be achieved by means of making all states a member of the League but also by means of propaganda and education.¹⁶²

2.4 Interim Conclusion

So far, the discussion of Schuman, Lasswell and Wright revealed a specific understanding of interdisciplinarity. For the three Chicago-based authors interdisciplinarity – or ‘intellectual cooperation’ (as it was often called during the interwar period) – is tied to the idea(l) to make both disciplines – IL and IR – more scientific, which means to turn them into a ‘social science’ (or a ‘new Policy Science’) merely understood as an impartial and neutral technique to conduct research. In other words, an external third is invoked and established in order to provide a new orientation for both disciplines.¹⁶³ To become an interdisciplinary scholar signifies then to become a generalist – a scholar “whose skills allowed acquisition of all other disciplines without formal training”.¹⁶⁴ And with this turn to ‘science’, comes also the promise that IR and IL are able not only to explain and predict international politics but also to deliver technical solutions in order to eliminate international violence and war. What becomes visible here is the fact that this understanding of interdisciplinarity comes also with a certain image of law as an important tool to create ‘world unity’ and establish peace.

¹⁶¹ For a recent study of the role of international law in US foreign policy during the first part of the twentieth century, see Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (New York: Oxford University Press, 2016).

¹⁶² Wright, *The Causes of War and the Conditions of Peace*, 98.

¹⁶³ On the figure of the ‘third’ in constructivism and social theory see Oliver Kessler, ‘The Contingency of Constructivism: On Norms, the Social, and the Third’, *Millennium* 45, no. 1 (2016): 43–63; see also Gesa Lindemann, ‘Die Emergenzfunktion des Dritten—ihre Bedeutung für die Analyse der Ordnung einer funktional differenzierten Gesellschaft’, *Zeitschrift für Soziologie* 39, no. 6 (2010): 493–511.

¹⁶⁴ Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850-2000’, in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2006), 45.

As Duncan Kennedy has noted recently, it was the legislator along with the administrator who became the “hero figures” of international thought during the interwar years.¹⁶⁵ Both administrator and legislator were designed as *social and legal engineers*, respectively. While in this context the task of the legislator was to draft the “multiplicity of that constituted the new order”, the administrator was portrayed as producing and enforcing “the detailed regulations that put legislative regimes into effect”.¹⁶⁶ Moreover, the area of activity of social and legal engineers was imagined to be within and around the newly established international organisations, with the League of Nations being the most important one.

This development is, of course, also connected to the more general ‘move to institutions’ on the international level.¹⁶⁷ In other words, the international imagined as international organization was the condition of possibility for this literature to emerge and it was during this period of time when it began that the international was imagined and “problematized in terms of *international organization*”.¹⁶⁸ All of the three authors shared these basic views.

But Schuman, Lasswell and Wright also differed – and these differences should lay the foundations for a number of new projects in both disciplines. While Schuman was certainly the less optimistic of the Chicago authors, his style of reasoning and his main assumptions should be shared by the main figures of political realism after the Second World War; Lasswell, on the other hand, should intensify his interest in the relevance of elite rule and apply this – then together with McDougal – to the legal field;¹⁶⁹ and finally, in particular Wright, who was the most explicit in developing IR (and IL) into a ‘social science’ should remain one of

¹⁶⁵ Kennedy, 43.

¹⁶⁶ Kennedy, 43.

¹⁶⁷ See Kennedy, ‘The Move to Institutions’.

¹⁶⁸ Oliver Kessler, ‘World Society’, in *Routledge Handbook of International Political Sociology*, ed. Xavier Guillaume and Pinar Bilgin (Abingdon: Routledge, 2017), 102 (emphasis in the original).

¹⁶⁹ It is by no surprise then that the first joint publication by Lasswell and McDougal was devoted to the topic of legal education, namely to the question of how to make legal education a tool to produce the US foreign policy elites for the future, see Harold D. Lasswell and Myres McDougal, ‘Legal Education and Public Policy: Professional Training in the Public Interest’, *Yale Law Journal* 52, no. 2 (1943): 203–95.

the central references and one of the driving forces of what Stanley Hoffmann later described as the development of IR into an “American Social Science”.¹⁷⁰

3. International Law and the Mirror of Politics: On Realism, Positivism and the Production of Blind Spots

Let us turn now to a second interdisciplinary project between IR and IL: the ‘strange’ relationship between classical legal positivism and political realism. This relationship is ‘strange’ in the first place as it has been usually neglected that there existed such a relationship between both at all. For instance, Martti Koskenniemi reconstructs in his well-received history of international legal thought *The Gentle Civilizer of Nations* the rise and fall of the European ties of IL. According to Koskenniemi, the European tradition of the field emerged in the second half of the nineteenth century with a strong link to the idea ‘to provide the legal conscience of the civilised world’ and started to fade out after the interwar years. Koskenniemi claims that merely two developments led this tradition to come to an end – and what he also seems to regret: it was, on the one hand, the emergence of policy-oriented approaches in IL exemplified in Lasswell and McDougal’s New Haven school and, on the other hand, the growing relevance of the discipline of IR in the form of its prevailing paradigm of political realism and in the person of its main representative Morgenthau. Put differently, these projects were more successful in terms of jurisdictional struggles in academia.

Morgenthau in turn is portrayed by Koskenniemi as a (hidden) translator of the central positions of Carl Schmitt into international affairs and into American academia.¹⁷¹ Koskenniemi justifies this claim by pointing out that, while both Schmitt and Morgenthau being lawyers by education, they relate law and politics in an asymmetric way by emphasising the primacy of the political over the legal and, hence, downgrading law to an epiphenomenon of political struggle (we have

¹⁷⁰ Stanley Hoffmann, ‘An American Social Science: International Relations’, *Daedalus* 106, no. 3 (1977): 41–60.

¹⁷¹ Here, Koskenniemi makes a rather strong claim: ‘international lawyers have been compelled to witness the growth of a neighbouring discipline – “international relations” – that has incorporated Schmittian insights as parts of its professional identity’, Koskenniemi, *The Gentle Civilizer of Nations*, 424.

already seen something similar in Schuman's *International Politics*). But if law is understood only as an epiphenomenon of political struggle, we have not to include it in our analysis of international politics. This is, according to Koskeniemi, the reason why IR and IL separated their ways in the aftermath of the Second World War. As a reaction IL itself turned to the formalistic analyses of legal positivism.¹⁷²

However, in this section I attempt to challenge the view that legal positivism and political realism did not share an interdisciplinary project. Instead, I will argue that they engaged in a hidden dialogue as the condition of possibility of both was the existence of the 'other'. To do so, I will briefly reconstruct Morgenthau's take on the relationship of law and politics by scrutinizing three of his interventions: his doctoral dissertation, his famous 1940 article in the *American Journal of International Law* and his early American work in IR.¹⁷³ I turn then (though very briefly) to legal positivism in order to argue finally that both, realism and positivism constitute a hidden interdisciplinary project as both, while not only sharing many epistemological and ontological commitments, construct their respective projects in the blind spot of each other.

3.1 Morgenthau, Political Realism – and the Irrelevance of International Law?

It is interesting to see that Morgenthau developed his main assumptions with regard to his image of the relationship of law and politics already in his doctoral dissertation, which he completed in 1927 at the University of Frankfurt and published as revised version two years later as *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* [The International Juridicary, its Nature and its Limits].¹⁷⁴

¹⁷² Koskeniemi, chap. 6; recently, Oliver Jütersonke has pointed out that Koskeniemi's claim about the close intellectual alliance between Schmitt and Morgenthau is exaggerated as both had hardly met and – more importantly – as both were involved in more general debates of their time. Consequently, Jütersonke argues that we should situate Morgenthau more broadly in the discussions of law and politics (in particular, the German tradition of the *Staatswissenschaften*) of the 1930s and '40s as he was in permanent exchange with legal scholars such as, for instance, Hersch Lauterpacht and Hans Kelsen. See Jütersonke, *Morgenthau, Law and Realism*. As my main focus in this chapter concerns logics of interdisciplinarity, I will not go into historical details in the remainder of this section.

¹⁷³ Thus, I do not include the work of all the main advocates of political realism in IR to this section. In particular, the work of E.H. Carr is missing.

¹⁷⁴ Hans J. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Leipzig: Universitätsverlag von Robert Noske, 1929).

The thesis examines the question of whether states feel obliged to subordinate their conflicts to organs of international judiciary (meaning bodies of arbitration or courts) and, if they do so, to what extent this is the case. The thesis topic, as Koskenniemi notes, was “a rather standard object of scholarly interest in the 1920s”.¹⁷⁵ Morgenthau is in thesis puzzled in his thesis by the fact that, on the one hand, the scope of the international judiciary is – in ‘objective’ terms – unlimited as every international conflict can be subsumed under general norms while, on the other hand, this does – *in reality* – not mean that all international conflicts are addressed before the international judiciary.¹⁷⁶ Morgenthau explains this gap by arguing that the ‘subjective’ limits of the political determine how law and politics are related. As Morgenthau famously remarks:

“The concept of the ‘legal’ and the ‘political’ do not constitute an adequate pair of concepts that could enter into a contradictory distinction. The conceptual distinction of the concept of political questions is formed by the concept of non-political questions and not by the concept of legal questions which, for its part, can be just as much of political as of non-political nature”.¹⁷⁷

As law and politics are not conceptualised as directly opposed (*kontradiktorischer Gegensatz*) we can identify two types of conflicts: firstly, political conflicts or, as Morgenthau calls them, *tensions* (*Spannungen*); secondly, non-political conflicts, which are in Morgenthau’s words *disputes* (*Streitigkeiten*). While disputes can be tamed by delegating them to the different mechanisms of the international judiciary, tensions have to remain unsolved here. Tensions, which are a “particularity of international relations” [“Eigentümlichkeit der zwischenstaatlichen Beziehungen”], have to be addressed in political terms – if

¹⁷⁵ Koskenniemi, *The Gentle Civilizer of Nations*, 440.

¹⁷⁶ Morgenthau, *Die internationale Rechtspflege*, 42.

¹⁷⁷ ‘Die Begriffe ‘rechtlich’ und ‘politisch’ bilden überhaupt kein adäquates Begriffspaar, dessen Teile in einen kontradiktorischen Gegensatz zueinandertreten könnten. Der begriffliche Gegensatz zu dem Begriff der politischen Fragen wird durch den Begriff der nichtpolitischen Fragen, nicht aber durch den Begriff der Rechtsfragen gebildet die ihrerseits ebenso wohl politischer als nichtpolitischer Natur sein können’, Morgenthau, 79 (all translations, if not indicated otherwise, are mine).

they can be addressed at all and do not constitute the result of deeper underlying and in general untameable psychological forces.¹⁷⁸

Consequently, conflict settlement in international relations is in principle a political and less a juridical question. Morgenthau's position resembles here the one of Schuman as discussed above. Tensions appear usually when questions of states' vital interests and, in particular, national honour, which both find their expression in international law through clauses of vital interest and honour (*Interessen- und Ehrenklauseln*), are at stake.¹⁷⁹ However, it is not possible to decide *a priori* whether a conflict is political or not. There are no objective criteria, which would allow us to subsume ["auf Grund einer reinen Subsumtionstätigkeit"] a conflict either under the label of the political or consider it as non-political.¹⁸⁰ Rather, the question whether something is political or not depends on the subjective perception of states and the international community. And, moreover, whether an issue or conflict becomes political is a question of "intensity".¹⁸¹ This observation has far-reaching consequences when we take the following paragraph into account:

"We have to remark that the distinction between political and non-political questions with regard to certain purposes is impossible as the concept of the political is not tied with conceptual necessity to certain purposes, as well as it is not excluded from certain purposes. The scope of political conflict cannot be determined by some material content; no question must be of political character due its material content, however, every question can have political character due to circumstances, which lie outside its own realm. The concept of the political has no substance, which is once and for all fixed, as it is rather a feature, a quality, a colouring, which can be attached to any kind of substance, but is not attached necessary to a certain substance. There are certain purposes, which attach the colour of the political

¹⁷⁸ Morgenthau, 72.

¹⁷⁹ Morgenthau, 128.

¹⁸⁰ Morgenthau, 71.

¹⁸¹ Morgenthau, 69. This should become the main topic of Morgenthau's second monograph, which was originally published in 1933: Hans J. Morgenthau, *The Concept of the Political* (New York: Palgrave Macmillan, 2012).

particularly easy and often, but it is not by nature the property of a certain purpose. A question that is of political character today can be deprived of its political meaning by tomorrow and a question of low significance can become a political question of first order only by night”.¹⁸²

According to Morgenthau these insights about the “indeterminate, through judicio-technical fixation untameable concept of the political” should help those who are in charge to create a more effective international legal order.¹⁸³ Such an order should consist of two features: firstly, it should be aware of its own (subjective) limits and, secondly, it should be dynamic rather than static (as, e.g., in legal formalism) in order to be able to adapt quick enough to the untameable nature of politics.¹⁸⁴ To sum up, Morgenthau conceptualises international law and politics in an asymmetric fashion where the political dominates the legal.

Morgenthau’s elaborations on the relationship of law and politics should culminate in his famous 1940 article *Positivism, Functionalism, and International Law*, which was published in the *American Journal of International Law*.¹⁸⁵ At the time of publishing this article Morgenthau had already been forced to immigrate to the United States and was working as an Assistant Professor for Law and Political Science at the University of Kansas City. It is worth to have a closer look at this article, which has been referred to as Morgenthau’s “legal swan song” as it

¹⁸² ‘Wir müssen demnach feststellen, daß eine Unterscheidung von politischen und nichtpolitischen Fragen nach Gegenständen unmöglich ist, da der Begriff des Politischen weder mit begrifflicher Notwendigkeit an bestimmte Gegenstände gebunden, noch von bestimmten Gegenständen ausgeschlossen ist. Das Gebiet der politischen Streitigkeiten ist nicht auf Grund des ihren Inhalt bildenden Materien ein für alle mal inhaltlich festzulegen; keine Frage muß auf Grund der ihren Inhalt bildenden Materien notwendig politischen Character haben, jede Frage jedoch kann auf Grund außerhalb ihres Gegenstandes liegender Umstände politischen Character erhalten. Der Begriff des Politischen hat keine Substanz, die ein für allemal feststände, er ist vielmehr eine Eigenschaft, eine Qualität, eine Färbung, die allen Substanzen mit Vorliebe anhaftet, keiner Substanz jedoch notwendig anhaften muß. Es gibt bestimmte Gegenstände, die die Farbe des Politischen besonders leicht und häufig annehmen, keinem Gegenstand ist sie von Natur eigen. Einer Frage, die heute politischen Character hat, kann morgen jede politische Bedeutung abgehen und eine Frage von an sich geringer Wichtigkeit kann über Nacht zu einer politischen Frage ersten Ranges werden’, Morgenthau, *Die internationale Rechtspflege*, 67; similarly, Morgenthau, *The Concept of the Political*, 100–101.

¹⁸³ ‘unbestimmten, juristisch-technischer Fixierung unzugänglichen Begriff des Politischen’, Morgenthau, *Die internationale Rechtspflege*, 145.

¹⁸⁴ Cf. Morgenthau, chap. 16.

¹⁸⁵ Hans J. Morgenthau, ‘Positivism, Functionalism, and International Law’, *American Journal of International Law* 34, no. 2 (1940): 260–84.

represents not only a break in Morgenthau's own biography but as it also stands for a broader movement and transition from European IL to American IR, i.e. a period where IR as late-coming discipline started to dominate the study of international affairs on the disadvantage of other disciplines such as diplomatic history and IL.¹⁸⁶

Morgenthau asserts in the article that traditional forms of positivism represent the mainstream of legal reasoning of this period as they lay the legal and intellectual foundation of the League of Nations and of what he refers more generally to as 'Geneva'. Here, traditional legal positivism (or as Morgenthau calls it, 'juridic positivism') is the main reason for the "collapse of the international law of Geneva" as the "failure of the post-World War science of international law is not due to personal or accidental circumstances; it grows out of the very assumptions and methods which have led juridic positivism to defeat in the domestic context" already.¹⁸⁷ However, juridic positivism was not able in the international context to learn from its prior domestic errors and to adapt to the new realities of international affairs. This is so as juridic positivism as it "blame[s] the facts for failure. When the facts behave otherwise than we have predicted, they seem to say, too bad for the facts. [...] As the League of Nations was a failure, let us have another League".¹⁸⁸

But what is, according to Morgenthau, juridic positivism exactly and why did it fail? For Morgenthau, juridic positivism emerged out of the more general turn to positivism in philosophy in the nineteenth century – a move that claimed to exclude metaphysical speculation from science and attempted, instead, to ground scientific knowledge only on direct observation. In the sphere of law the turn to positivism produced four consequences which are according to Morgenthau: (1)

¹⁸⁶ Koskeniemi, *The Gentle Civilizer of Nations*, 459. On German emigre scholars in the United States and their particular role in the transition from IL to IR, see Alfons Söllner, 'Vom Völkerrecht zur Science of International Relations. Vier typische Vertreter der politikwissenschaftlichen Emigration', in *Exil, Wissenschaft, Identität: Die Emigration deutscher Sozialwissenschaftler 1933-1945*, ed. Ilja Srubar (Frankfurt am Main: Suhrkamp, 1988), 164–80.

¹⁸⁷ Morgenthau, 'Positivism, Functionalism, and International Law', 264–265. According to Gerry Simpson, Morgenthau was only 'beating a dead horse' as by the time of writing his polemic article the international legal discourse had already moved beyond Geneva, Gerry Simpson, 'Duelling Agendas: International Relations and International Law (Again)', *Journal of International Law & International Relations* 1, no. 1–2 (2004): 63 (footnote 5).

¹⁸⁸ Morgenthau, 'Positivism, Functionalism, and International Law', 260.

“legalism” as juridic positivism devotes itself strictly to the legal sphere and demarcates itself “from ethics and *mores* as well as psychology and sociology”; (2) “*étatist* monism” – i.e., a restriction on “legal rules enacted by states, and excludes all law whose existence cannot be traced to the statute books or the decisions of courts”; (3) moral “agnosticism” as legal positivism has no preference vis-à-vis the value system represented by the rules it is constituted of; and (4) “dogmatic conceptualism” as it advocates the idea that “a logically coherent system of law” can be constructed in which the system of law, particular rules and cases are tied together through “logical deduction”.¹⁸⁹

On the basis of these tenets Morgenthau identifies a couple of misconceptions of juridic positivism, which result from the “assumption that law, as it really is, can be understood without the normative and social context in which it actually stands”.¹⁹⁰ This means for Morgenthau that it is, first, impossible to blend law’s normative sphere out as “[l]aw, ethics, and *mores* support each other [...]. Legal rules refer to ethics and *mores* for the determination of their meaning and *vice versa*”.¹⁹¹ In international law this becomes visible when we look at certain principles or ideas of civilization, which had become predominant for certain periods of time and were translated into legal rules. This line of argument is for Morgenthau, however, just an attempt to eliminate one metaphysics with another as the idea that it is possible to get rid of metaphysical presuppositions is by itself a “metaphysical attitude, a kind of negative metaphysics”.¹⁹² Second almost the same holds true for the sociological context as “economic interests, social tensions, and aspirations for power [...] are the motivating forces in the international field”.¹⁹³ It is impossible to understand the conclusion of international treaties or the different (and sometimes conflicting) interpretations of a specific legal text without studying transformations of the sociological situatedness. And finally, one can witness how the firm boundaries of the assumptions of ‘*étatist* monism’ and legalism (written statutes, etc.) are cracked open through the doctrine of customary law “which has become a veritable

¹⁸⁹ Morgenthau, 261 (emphasis in the original).

¹⁹⁰ Morgenthau, 267.

¹⁹¹ Morgenthau, 268 (emphasis in the original).

¹⁹² Morgenthau, 269.

¹⁹³ Morgenthau, 269.

panacea for its [i.e., international law's] theoretical troubles" as it is mobilised whenever formal rules are lacking.¹⁹⁴

It is due to these misconceptions that this stream of legal positivism has become the subject of several attacks from different directions: the renaissance of *moderate natural law* as represented by Hersch Lauterpacht's writings;¹⁹⁵ a radicalisation and 'scientification' of positivism in Hans Kelsen's *neo-positivism*;¹⁹⁶ and a *realist* (also known as 'sociological' or 'functional') jurisprudence advanced, for example, by Morgenthau himself. Morgenthau claims that his own approach is realist as a "truly scientific theory of international law" must deal with international law "as it really is"; in order to do so, it has to be aware of the sociological background which is represented by the "psychological, social, political and economics forces"; and, it has to identify the dual "functionalist relationship between those forces and legal rules" as, on the one hand, international law is the "function of the civilization in which it originates" (in particular: "ethics and *mores*") and, on the other hand, international law itself shapes as a "social mechanism working towards certain ends" the civilization of which it is part of.¹⁹⁷

Moreover, Morgenthau argues that, if one is aware of the social forces in the background of the international legal order,

"[i]nternational law owes its existence to identical or complementary interests of states, naked by power as a last resort, or, where such identical interests do not exist, to a mere balance of power which prevents a state from breaking these rules of international law. Where there is neither community of interests nor balance of power there is no international law".¹⁹⁸

¹⁹⁴ Morgenthau, 273 (emphasis in the original).

¹⁹⁵ Cf. Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011). See also my discussion of Lauterpacht in Chapter 6.

¹⁹⁶ See, for example, Hans Kelsen, *Peace Through Law* (Chapel Hill: University of North Carolina Press, 1944). For a reconstruction of Kelsen's work in international law, see Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: Cambridge University Press, 2010).

¹⁹⁷ Morgenthau, 'Positivism, Functionalism, and International Law', 274.

¹⁹⁸ Morgenthau, 275.

As a consequence, Morgenthau links this observation to the main argument of his doctoral dissertation as it is essential for a ‘functional’ theory of international law to understand that there exists a “political” and a “non-political” international law in the form of *tensions* and *disputes*.¹⁹⁹ Furthermore, Morgenthau extends this discussion to the issue of the validity of international law as for him rules of international law are only valid if their violation is sanctioned whereas if this is not the case they “never become valid law” (his examples are the Treaty of Versailles and the Covenant of the League of Nations).²⁰⁰

The 1940 article was Morgenthau’s last text, which was explicitly addressed to an international legal audience. In the years that followed Morgenthau started to play an essential role in establishing IR as a discipline in the US (especially after he moved from the University of Kansas to the University of Chicago in 1944). As recently Robbie Shilliam, Oliver Jütersonke and others convincingly argued, Morgenthau’s transformation into an IR scholar was more a process of transition from European IL to American IR than an immediate rupture with the former; it was less a start from nowhere than the *translation* of previous work into three new contexts:²⁰¹ American academia with its specific projects, institutions, rules, discourses, cognitive interests and objects of study; a second ‘birth’ of the discipline of IR, now in the US (after the first was located more in post-First World War Europe and the almost mythical place of origin of Aberystwyth), which should culminate in the idea that IR is representing a genuine ‘American social science’; and finally, the changing architecture of the international sphere moving from the interwar years and the Second World War context towards the bipolar order of the rising Cold War era.²⁰² In this regard one can read Morgenthau’s three first

¹⁹⁹ Morgenthau, 278–280.

²⁰⁰ Morgenthau, 275; Morgenthau addresses the question of the validity of international law in more detail in his *Habilitationsschrift*, Hans J. Morgenthau, *La Réalité des normes. En particulier des normes du droit international. Fondement d’une théorie des normes* (Paris: Alcan, 1934).

²⁰¹ See Robbie Shilliam, *German Thought and International Relations: The Rise and Fall of a Liberal Project* (Houndmills: Palgrave Macmillan, 2009); and Jütersonke, *Morgenthau, Law and Realism*. A good overview of the more general movement among German-speaking émigré scholars moving from an affiliation in IL to one in IR (the list includes, e.g., John Herz, Karl Deutsch, Henry Kissinger and even Hans Kelsen) is provided by Söllner, ‘Vom Völkerrecht zur Science of International Relations’.

²⁰² Cf. Richard Ned Lebow, *The Tragic Vision of Politics: Ethics, Interests, and Orders* (Cambridge: Cambridge University Press, 2003), 250–256.

American books, *Scientific Man vs. Power Politics*, *Politics Among Nations* and *In Defense of the National Interest*, which have been published within a short period of time (1946-1951), as speaking to these three contexts: *Scientific Man vs. Power Politics* is addressing the first context; while *Politics Among Nations* the second; and *In Defense of the National Interest* the third one. However, this is not the place to trace back and discuss Morgenthau's three 'American books' in full detail. Suffice is to say that I will concentrate on a few, however pivotal, developments of these books. What is common to all three books is that while their main focus seems gradually shifting away from international law they still operate within the confines of *examining the limits of international law*.²⁰³

For instance, *Scientific Man vs. Power Politics*, which was published in 1946 but was based on a series of lectures that Morgenthau had provided in 1940 in New York, presents a polemic essay, on the one hand, against the liberal 'scientific' approach regarding the social sciences in general and IR more specifically that had been developed *inter alia* one decade earlier at the University of Chicago;²⁰⁴ on the other hand, Morgenthau attacks what he calls the "legalistic spirit" of the interwar years.²⁰⁵ As Morgenthau puts it, both the reliance on science as well as on 'legalism', come with the idea that, e.g., war is the result of brute power politics and that it has been untameable for a long time as the political and legal sciences were in a rather primitive stage of their development. Yet, according to Morgenthau, during the first decades of the twentieth century the figure of the 'scientific man' emerged and with it the belief that peace could be established by juridico-technical means. As Morgenthau portrays it, this strand of thought includes also that social and natural sciences share the same 'logic of inquiry' and that the social sciences could – and should – catch up the earlier success of the natural sciences (in order tame the social as the natural sciences tamed nature). As Morgenthau summarizes, the approach of the 'scientific man' claims that "politics should be 'reformed' and 'rationalized'. Political manoeuvring should be replaced by the scientific 'plan,' the political decision by the scientific 'solution,' the politician by the 'expert,' the

²⁰³ In a similar way Jütersonke claims that 'the Morgenthau reception in International Relations continues to ignore, or at least underestimate, the significance of the fact that Morgenthau was originally a legal scholar', Jütersonke, *Morgenthau, Law and Realism*, 31.

²⁰⁴ On this, see my discussion of the interwar scholarship at the University of Chicago earlier in this chapter.

²⁰⁵ Morgenthau, *Scientific Man vs. Power Politics*, 98.

statesmen by the 'braintruster,' the legislator by the 'legal engineer.'"²⁰⁶ In a striking paragraph, Morgenthau describes what this move towards the 'legal engineer' might signify for the relationship of law and politics. It is worth to quote the whole paragraph:

"The rule of law has come to be regarded as a kind of miraculous panacea which, wherever applied, would heal, by virtue of its intrinsic reasonableness and justice, the ills of the body politic, transform insecurity and disorder into the calculability of a well-ordered society, and put in the place of violence and bloodshed the peaceful and reasonable settlement of social conflicts. The rule of law had accomplished this in the domestic field, and the rule of law would accomplish it again in the international sphere, provided it was given a chance. Transfer the rule of law to international affairs and 'order under law' will reign supreme there, too. How to effect this transfer remains, then, the only problem to be solved. Persuasion, propaganda, education, scientific proof, and democratization of foreign affairs are the means by which governments and people shall be induced to put international relations under the dominance of the rule of law".²⁰⁷

Morgenthau uses – or better: invents – the figure of the 'Scientific Man' as a typical straw man. By contrasting the project of the 'Scientific Man', Morgenthau argues in line with his previous work that international tensions and war cannot be eliminated through the scientific and legalistic tools of the 'Scientific Man' as such an approach overlooks the "contingent character of social reality"²⁰⁸ and oversees that struggles on an international level are the result of deeper, often uncontrollable, psychological and social forces in the struggle for power. This brings Morgenthau to the conclusion that *politics "is an art and not a science, and what is required for its mastery is not the rationality of the engineer but the wisdom and moral strength of the statesman"*.²⁰⁹ As we will see below, the idea that politics is only – to a very limited extend – tameable through what is often referred to as

²⁰⁶ Morgenthau, 31–32.

²⁰⁷ Morgenthau, 100.

²⁰⁸ Morgenthau, 130.

²⁰⁹ Morgenthau, 16 (emphasis added).

the 'prudence' of the statesman should become one of the central claims of Morgenthau's work as well as in classical realist approaches more generally.

In a similar vein as with *Scientific Man vs. Power Politics* and, Oliver Jütersonke persuasively suggested, contrary to many of today's "mainstream conceptions, *Politics Among Nations* was not a book on what today would be called International Relations theory, constituted in the vein of Political Science" but it was rather "*a book on the practical limitations to the use of law in the international realm*, written at a time when peaceful change seemed an increasingly futile endeavour and the bipolar stalemate that was to become the Cold War an ominous reality".²¹⁰ As we can read in the first sentence of the first edition of Morgenthau's seminal textbook *Politics Among Nations* (published in 1948), "[i]nternational politics, like all politics, is a struggle for power".²¹¹ This general statement is further sub-divided and plays out in three different policies: the "policy of the status quo" ("to keep power"), the "policy of the imperialism" ("to increase power") and the "policy of prestige" ("to demonstrate power"). International law is only important in the context of the first kind of 'policy' as it "is a favourite device of status quo nations" in order to perpetuate the existing order (and strengthen an existing balance of power), while "[i]mperialistic nations are inevitably opposed to the existing status quo and its legal order and will not think of submitting the controversy to the authoritative decision of an international court".²¹² This is also because, as we learned in a similar way already from Schuman, "[l]aw in general and, especially, international law is primary a static social force"²¹³ and that "disputes which are most likely to lead to war cannot be settled by judicial means".²¹⁴ However, this does not mean that international law does not exist (according to Morgenthau, an argument exemplified and popularized in the nineteenth century by the jurisprudence of John Austin) as "to deny that international law exists at all as a system of binding rules flies in the face of all evidence. This misconception as to the existence of international law is at least in part the result of the disproportionate attention which public opinion has paid in

²¹⁰ Jütersonke, *Morgenthau, Law and Realism*, 179 (emphasis added).

²¹¹ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1948), 1.

²¹² Morgenthau, 343.

²¹³ Morgenthau, 64.

²¹⁴ Morgenthau, 350.

recent times to a small fraction of international law, while neglecting the main body of it".²¹⁵

Yet, that international law exist does not mean that the role of law in international affairs is identical to the one law plays on the domestic level. In this respect Morgenthau puts forward that "[i]nternational law is a *primitive type of law* resembling the kind of law which prevails certain preliterate societies".²¹⁶ As international law works only in limited cases, Morgenthau puts his hopes, as he did in *Scientific Man vs. Power Politics* already, in the role of the *statesman* and the related institution of *diplomacy*. However, diplomacy can only be successful if it abandons the errors of the "new parliamentary diplomacy", which Morgenthau identifies with the diplomatic practices of the interwar years.²¹⁷ If diplomacy is controlled by parliaments, it loses its grip as, for example, international politics become the subject of day-to-day party politics. Contrary to this, diplomacy should rely, according to Morgenthau, on the practical wisdom of *foreign policy elites*, the *statesmen* and *diplomats*. "The continuing success of diplomacy in preserving peace depends", as Morgenthau summarizes, "upon the extraordinary moral and intellectual qualities which all the leading participants must possess".²¹⁸

To emphasise the significant role of diplomacy and the prudent statesman is the general theme which Morgenthau, but also other important realist figures such as George F. Kennan and Henry Kissinger, should pursue in the following years. Morgenthau's third American book *In Defense of the National Interest* is a striking example of this turn. While Morgenthau's earlier assessment of diplomacy such as in *Politics Among Nations* was still limited to its role in *international* politics, the focus shifts with *In Defense of the National Interest* to *foreign policy analysis* (or a theory of foreign policy). With regard to international law, the question is now what role international law could play in the context of foreign policy. This shift of the 'referent object' from the achievement of *international peace and security* towards the maintenance of *US-foreign-affairs-focused peace and security* becomes also visible by the fact that we can observe an increasing *policy relevance* of IR

²¹⁵ Morgenthau, 211.

²¹⁶ Morgenthau, 211 (emphasis added).

²¹⁷ Morgenthau, 431.

²¹⁸ Morgenthau, 444.

scholars as the revolving door between academia, emerging think tanks and the US State Department began to spin faster: in this regard Kennan and Kissinger are, of course, two of the most famous examples but also Morgenthau worked between 1949 and 1951 as a consultant for Kennan's *Policy Planning Staff* at the State Department.²¹⁹ This shift becomes also visible in *In Defense of the National Interest* where Morgenthau traces back the recent history of US foreign policy as well as he attempts to identify its main flaws.

In this book Morgenthau listed "legalism" among the main flaws (or as he puts it: "intellectual errors") of American foreign policy during the interwar years.²²⁰ Morgenthau portrays the, what he calls, "legalistic approach to foreign policy" as a "logical development" of a "utopian, non-political conception" of foreign policy where it is assumed that international politics is "an undertaking by peace-loving nations".²²¹ Yet, the legalistic approach dramatically underestimates for Morgenthau that "[f]oreign policy like all politics, is in its essence a struggle for power, waged by sovereign nations for *national* advantage".²²² Importantly, legalism is often not only irrelevant but can even make things worse if it is combined with 'utopianism' as this leads, for example, to the criminalization of war. When war is criminalized, Morgenthau explains, a conflict between two states, "instead of seen in terms of relative power, is conceived in absolute terms of power, law, and order vs. aggression, crime, and anarchy".²²³ In accordance with his earlier work, Morgenthau claims now that US foreign policy should avoid any legalistic and utopian reasoning and, instead, concentrate mainly on diplomacy and statesmanship and rely on international law only to consolidate an already existing and favourable balance of power. International law is again conceptualised as a static technique to pursue status quo policies.

²¹⁹ A fascinating study of the interlinks between these institutions during the whole Cold War era - and how these institution formed and established a distinct 'Cold War rationality' - is provided by Paul Erickson et al., *How Reason Almost Lost Its Mind: The Strange Career of Cold War Rationality* (Chicago: The University of Chicago Press, 2013).

²²⁰ Morgenthau lists four 'intellectual errors': These are 'utopianism', 'sentimentalism', 'neo-isolationism' - and 'legalism', Hans J. Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy* (New York: Alfred A. Knopf, 1951), chap. 4.

²²¹ Morgenthau, 101.

²²² Morgenthau, 92 (emphasis added).

²²³ Morgenthau, 102.

As I noted already, we can find similar position in the work of Kennan and Kissinger. While Kennan scrutinizes in his *American Diplomacy* the history of US foreign policy during the nineteenth and early-twentieth century, Kissinger concentrates in *A World Restored* on the European context in the aftermath of the Congress of Vienna and the resulting balance of power of the nineteenth century 'Concert of Europe'. Here, Kennan's central claim is that US diplomacy relied too much on, what he famously coined, "a legalistic-moralistic approach to international politics".²²⁴ This approach is characterized by the belief "that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some systems of legal rules and restraints".²²⁵ For Kennan, however, this is bound to fail as the "legalistic approach to international affairs ignores in general the international significance of political problems and the deeper sources of international instability", in particular as many states will not accept to subordinate their political aspiration under an international judiciary.²²⁶ In addition, international law is not dynamic enough to adapt to the rapidly changing contours of international politics:

"The function of a system of international relations is not to inhibit this process of change by imposing a legal strait jacket upon it but rather to facilitate it: to ease its transitions, to temper the asperities to which it often leads, to isolate and moderate the conflicts to which it gives rise, and to see that these conflicts do not assume forms too unsettling for international life in general. But this is the task of diplomacy, in the most old-fashioned sense of the term. For this, law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected".²²⁷

However, these are more or less juridico-technical shortcomings 'only' while the main deficiency lies in the intersection of law and morality, namely it

²²⁴ George F. Kennan, *American Diplomacy*, 60th-anniversary expanded edition (Chicago: The University of Chicago Press, 2012), 101.

²²⁵ Kennan, 102.

²²⁶ Kennan, 105.

²²⁷ Kennan, 104.

“is the inevitable association of legalistic ideas with moralistic ones: the carrying-over into the affairs of states of the concept of right and wrong, the assumption that state behavior is a fit subject for moral judgment. Whoever says there is law must of course be indignant against the lawbreaker to the point of complete submissiveness—namely, unconditional surrender. It is a curious thing, but it is true, that the legalistic approach to world affairs, rooted as it is unquestionably in a desire to do away with war and violence, makes violence more enduring, more terrible, and more destructive to political stability than did the older motives of national interest. A war fought in the name of high moral principle finds no easy end short of some form of total domination”.²²⁸

This position is of course identical with Morgenthau’s earlier criticism of a foreign policy, which integrates utopianism and legalism. Likewise Kennan claims that instead of pursuing the politics of the ‘legalistic-moralistic approach’ of the international, the United States should stick to the less ambitious politics of diplomacy and start to follow its own national interest.²²⁹

In terms of the architecture of the international order – and this is where Kissinger’s contribution was important – ‘stability’ should become the central – and only feasible – goal. As Kissinger argues, stability is possible only within a “legitimate international order” – something that was created in the aftermath of the Napoleonic Wars by the drafters of the Treaty of Vienna.²³⁰ This kind of stability was, however, lost during the late nineteenth century and in the first half of the twentieth century as diplomats and politicians attempted to establish a *just* international order. Thus the search for *legitimacy* should not be confused with the quest for a *just* international order as imagined by (the straw man of) interwar idealism. “Stability”, Kissinger writes,

²²⁸ Kennan, 107. This resembles, of course, what Carl Schmitt called the ‘problem of just wars’ (‘das Problem gerechter Kriege’), i.e. a shift from constrained warfar towards wars of annihilation in the name of humanity, Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 4th ed. (Berlin: Duncker & Humblot, 1997), 298–299.

²²⁹ Kennan, *American Diplomacy*, 109.

²³⁰ Henry A. Kissinger, *A World Restored: Metternich, Castlereagh and the Problems of Peace 1812-22* (London: Phoenix Press, 2000); see also Henry A. Kissinger, ‘The Congress of Vienna: A Reappraisal’, *World Politics* 8, no. 2 (1956): 264–80.

“has commonly resulted not from a quest for peace but from a generally accepted legitimacy. ‘Legitimacy’ as here used should not be confused with justice. It means no more than an international agreement about the nature of workable arrangements and about the permissible aims and methods of foreign policy. It implies the acceptance of the framework of international order by all major powers [...]. A legitimate order does not make conflicts impossible, but it limits their scope. Wars may occur but they will be fought *in the name of* the existing structure and the peace which follows will be justified as a better expression of the ‘legitimate’, general consensus. Diplomacy in the classic sense, the adjustment of differences through negotiation, is possible only in ‘legitimate’ international orders”.²³¹

I will revisit the notion of ‘legitimacy’, which Kissinger does not further develop (he uses it almost synonymously with stability and order), below. At this point ‘legitimacy’ has not to concern further. Rather, it is important to stress that Morgenthau’s three US-American books together with the writings of Kennan and Kissinger constitute in a way the golden age of classical realism in IR. What we see in the realist tradition is that the earlier imaginary of international law, as something that can regulate politics and help to secure peace, comes increasingly into defence. Already soon, however, classical realism itself should become the target of several attacks, particularly in form of the emerging behaviourist revolution (which arrived in IR compared to other social sciences quite late), and start to fade out slowly. However, this has not to concern us here.²³²

²³¹ Kissinger, *A World Restored*, 1–2 (emphasis in the original).

²³² Yet, see on the history and consequences of the ‘debate’ between traditional and behaviourist approaches, usually known as IR’s ‘second great debate’: Friedrich Kratochwil, ‘History, Action and Identity: Revisiting the “Second” Great Debate and Assessing Its Importance for Social Theory’, *European Journal of International Relations* 12, no. 1 (2006): 5–29.

3.2 Oppenheim, Legal Positivism – and the Elimination of Politics?

In this subsection I will shortly reconstruct a number of central assumptions of legal positivism in IL. This will help me to compare legal positivism and political realism – and to point to interdisciplinary connection points – in the conclusion (3.3) of this section. The reconstruction of legal positivism will be considerably shorter than the one of political realism in the previous subsection (3.1). I will this only provide a spotlight on the project of legal positivism in IL – a spotlight that cannot capture this rich tradition of international legal theory.²³³ I justify this for two reasons: first, this chapter is mainly interested in the role of law, the relationship between law and politics as well as images of interdisciplinarity *within* IR (i.e., ‘to follow the law in IR’) although this runs the risk to reify disciplinary boundaries (though, I think, section 5 will help to reflect on this sufficiently); second, as I will come back to legal positivism later in this study (when I inquire into the use of jurisdiction in legal positivism), this helps me to avoid redundancies. This said, I reconstruct some tenets of legal positivism in IL by introducing Lassa Oppenheim’s seminal 1908-article on *The Science of International Law*.²³⁴ The article is particularly interesting for our purpose as it attempts, in a similar way with Morgenthau’s 1940-article, to outline and popularize a specific approach to an American IL audience (as Oppenheim was coming from an European and here, first and foremost, British tradition).²³⁵ Moreover, Morgenthau praises in the textbook *Politics among Nations* from the second edition (published in 1954) onwards Oppenheim’s view on the

²³³ For a comprehensive and excellent study on the role of legal positivism in international law (in particular, analysing the work of Lassa Oppenheim and Hans Kelsen), see Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013). Particularly Kelsen’s legal positivism works differently from Oppenheim’s. As with so many denominations of schools or approaches, ‘positivism’ is a rather broad and all-encompassing umbrella term. The main difference between Kelsen and Oppenheim is that the former (Kelsen) understands international law (as law in general) as a system, whose rules can be logically deduced from a *Grundnorm* (in the case of international law: ‘pacta sunt servanda’), while the latter (Oppenheim) conceptualises international law as ‘the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other’ and nothing more, Lassa Oppenheim, *International Law: A Treatise*, vol. I: Peace (London: Longmans, Green and Co., 1905), 2. For a comprehensive study of Kelsen’s account of international law see also von Bernstorff, *The Public International Law Theory of Hans Kelsen*.

²³⁴ Lassa Oppenheim, ‘The Science of International Law: Its Task and Method’, *American Journal of International Law* 2, no. 2 (1908): 313–56.

²³⁵ On Oppenheim’s personal and intellectual biography, see García-Salmones Rovira, *The Project of Positivism in International Law*, chap. 2 and 3.

relationship of law and politics and, especially, his use of balance of power thinking.²³⁶

Writing in 1908, Oppenheim claims that international law is “still in the beginning of its development” as it is mainly composed of customary rules.²³⁷ Among the tasks of the ‘science’, i.e. academic discipline, of IL Oppenheim identifies to state the already existing codified international law as well as to identify and evaluate the extent and history of international customary law.²³⁸ However, by referring to – and in order to oppose – the project of natural law international law, Oppenheim claims that the “international jurist must not walk in clouds; he must remain on the ground of what is realizable and tangible”.²³⁹ We can see what this means, for instance, in Oppenheim’s discussion of the role of the ‘science of international law’ in the process of preparing the codification of already existing customary rules. For Oppenheim international law’s codification neither can nor should “revolutionize the present international order and put the whole system of international law on a new basis”.²⁴⁰ Instead, international law should mirror international politics. Moreover, he stresses also that usage and custom should be distinguished sharply as usage alone does not constitute customary law.²⁴¹ In addition, ‘the science of international law’ should not “fill in the gaps in the existing rules of international law unless a conclusion *per analogiam* suggests itself with such force that its acceptance is obvious and absolutely necessary”.²⁴² In other words, the task of the international legal academic is quite a restrained one

²³⁶ See Jütersonke, *Morgenthau, Law and Realism*, 72. See already Morgenthau’s rather positive evaluation of Oppenheim’s use of the balance of power in Hans J. Morgenthau, ‘International Affairs’, *The Review of Politics* 10, no. 4 (1948): 494.

²³⁷ Oppenheim, ‘The Science of International Law’, 317.

²³⁸ It is interesting to note at this point how sharp Oppenheim distinguishes between science and international law as a field of practice. One can find a similar separation also in the work of Hans Kelsen and other international legal positivists. The separation between observer and observed is of course typical for positivism (and its roots in *scientific* positivism) more generally and its many other neo-Kantian dichotomies (e.g. normative/descriptive).

²³⁹ Oppenheim, ‘The Science of International Law’, 318. Connected to this Oppenheim argues that the role of the authority of international legal scholars as a source of international law is overrated whereas the role of black and letter law in the form of treaties is underrated. Similarly, he claims that the ‘future of law belongs to conventional and not to customary law’, Oppenheim, 348–349.

²⁴⁰ Oppenheim, ‘The Science of International Law’, 319.

²⁴¹ Oppenheim, 334.

²⁴² Oppenheim, 335.

as s/he should describe the already existing international legal order and not invent a revolutionary new order.²⁴³

The reason why this so can be found in Oppenheim's image of international law and in his conceptualisation of the relationship between law and politics. According to Oppenheim international law cannot go beyond the practices of states when "independence, honor, or vital interests" are at stake (we have seen a similar position in Morgenthau's discussion of tensions and disputes above).²⁴⁴ As a consequence, for Oppenheim, there exists no "universal international law", i.e. a law that goes beyond the interaction of states, at the moment (and he does not expect that there will exist one in the future).²⁴⁵ Thus, states are the only subjects of international law.²⁴⁶ Accordingly, international law operates in a horizontal and not in a vertical way, as "international law is a law not above but between states".²⁴⁷ In the end, the existence of international law depends on the existence of a *balance of power* as such a balance is the only setting where vital interests remain uncontested.²⁴⁸

²⁴³ This holds also for international judges, which 'are tools in the hands of custom and legislation' and 'are law-shapers, law-developers, law-finders, and law-excavators, but not real law-makers and law-givers', Oppenheim, 337.

²⁴⁴ Oppenheim, 322.

²⁴⁵ Oppenheim, 321.

²⁴⁶ As Oppenheim writes in his textbook: 'Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law', Oppenheim, *International Law*, I: Peace:18. Oppenheim conceptualises the individual within the international legal order as follows: 'If, as stated, individuals are never subjects but always objects of the Law of Nations, then nationality is the link between this law and individuals', Oppenheim, I: Peace:345.

²⁴⁷ Oppenheim, 'The Science of International Law', 322; For Oppenheim, international law is thus 'law' and not, like for the 'deniers of international law' (as, for example John Austin) nothing more as a 'positive morality', Oppenheim, 330–333.

²⁴⁸ As Oppenheim argued elsewhere, the 'Law of Nations can exist only if there is an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep each one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a central political authority above the Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent', Oppenheim, *International Law*, I: Peace:73–74. For further discussion see also the discussion in Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', *European Journal of International Law* 13, no. 2 (2002): 416–421.

3.3 Interim conclusion

In this section, I have discussed so far different projects in IR's political realism (mainly Morgenthau; but also Kennan and Kissinger) and in IL's legal positivism (Oppenheim) and mapped how these projects address the relationship of law and politics. In particular the work of Morgenthau is characteristic for early IR scholars, especially from the late 1930s onwards, as it has also an important 'disciplinary' dimension. As Friedrich Kratochwil reflects, realists started to pursue at this period a strong *anti-legalist* project as the "development of the new discipline of 'international relations' [...] required an independence from the legal discourse and its concerns".²⁴⁹ We can find such an attempt to delineate IR as an autonomous field of study, for instance, in Kennan's critique of the 'legalistic approach to international relations', in Morgenthau's work from the 1940s onwards or in the publications of E.H. Carr.²⁵⁰

But, according to Kratochwil, this is only one part of the story. The other – and often missing – part is that international legal positivism, represented particularly in the projects of Hans Kelsen and Lassa Oppenheim, attempted to become more 'scientific' (in different ways, though), too – something of which Morgenthau was fully aware of as he excluded in his 1940 article this kind of positivism from his overall critique of traditional or 'juridic' positivism.²⁵¹ What is important to note in this regard, is that to become more scientific means for international legal positivists the *exact opposite* as for Morgenthau, Kennan or Carr, namely *it means to get rid of politics and the social and normative underpinning of law. The aim for the legal positivists was accordingly to develop a pure, objective, formal and apolitical theory of law.*²⁵²

²⁴⁹ Friedrich Kratochwil, 'How Do Norms Matter?', in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 37; see also Friedrich Kratochwil, 'Constructivism as an Approach to Interdisciplinary Study', in *Constructing International Relations: The next Generation*, ed. Karin M. Fierke and Knud Erik Jørgensen (Armonk: M.E. Sharpe, 2001), 21–24; as well as Simpson, 'Duelling Agendas'; and Tanja Aalberts and Ingo Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice', in *International Law as a Profession*, ed. Jean d'Aspremont et al. (Cambridge: Cambridge University Press, 2017), 287–310.

²⁵⁰ I have not introduced Carr's work in this section. Yet, see Carr, *Twenty Years' Crisis*, chap. 10.

²⁵¹ See, for instance, Morgenthau, 'Positivism, Functionalism, and International Law', 263, 266.

²⁵² See García-Salmones Rovira, *The Project of Positivism in International Law*.

This forms a specific constellation as realist accounts in IR and the positivist framework in IL constitute what has been labelled an “analytic synthesis”²⁵³ or even a “strange symbiosis”.²⁵⁴ This observation mirrors also what Judith Shklar had suggested earlier in her seminal study of ‘legalism’. As Shklar notes, the “realistic picture of politics is [...] that of legalism gone sour”.²⁵⁵ For Shklar, this is the case as a closer look reveals that realist scholars are using the same method as international legal positivist, their “professed opponents”, as they “have simply applied the same type of arguments that legal theorists have used in separating law from morality to the task of preserving politics from both law and morality”.²⁵⁶ One consequence of this development consists for Shklar in an impoverished picture of both the concept of politics as well as the concept of law as ‘politics’ gets reduced to a permanent war-like struggle for power while ‘law’ is boiled down to an image of extreme formalistic legalism.²⁵⁷

Another consequence of this constellation was that realist IR and positivist IL could start to engage in a kind of division of labour as both disciplines attempt to become more scientific through an exclusion of the main object of study of the other: politics is excluded in the case of IL; and law is excluded in the case of IR.²⁵⁸ However, the result of this development, exceptions notwithstanding,²⁵⁹ was an

²⁵³ Anne-Marie Slaughter, ‘International Law in a World of Liberal States’, *European Journal of International Law* 6 (1995): 537.

²⁵⁴ Kratochwil, ‘How Do Norms Matter?’, 37; similarly: ‘Consequently, there exists a paradox in that attempts to separate these two disciplines as much as possible leads not only to similar conceptual difficulties but also uncovers a certain symbiotic relationship between these two foundationalist attempts. In other words, legalism (of which the theory of ‘pure law’ is only the most recent and best articulated version) needs realism not only as an opponent in regard to concrete issues, but also for its own self-understanding’, Friedrich Kratochwil, ‘Politics, Norms and Peaceful Change’, *Review of International Studies* 24, no. 5 (1998): 200. As well as: “Realists and legalists, then, share a particular orthodoxy about law drawn from a model of legality that no longer commands much support among those who have studied the varieties of law at the domestic, regional and international level. In other words, the standoff between IR and PIL [Public International Law] occurred because the dominant camp in each group shared a view of the law”, Simpson, ‘Duelling Agendas’, 72. Or: Onuf, *World of Our Making*, 242.

²⁵⁵ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986), 126.

²⁵⁶ Shklar, 126.

²⁵⁷ See Shklar, 122–123.

²⁵⁸ Resembling somehow also the German nineteenth century distinction between *Begriffsjurisprudenz* (‘conceptualism’ or conceptual jurisprudence) and *Interessenjurisprudenz* (‘interests’ or sociological jurisprudence).

²⁵⁹ For example, in the United States Quincy Wright continued writing extensively on issues of international law and attempted to integrate both academic fields until his death in 1970; scholars such as Stanley Hoffmann, who was also a lawyer by education, and Karl W. Deutsch (and many other regional integrationists) were leading figures in IR and published also on international law;

increasing estrangement or “schism” between IR and IL on an institutional level. As both stopped speaking with each other and rather started to speak of each other, their differences were usually overstated.²⁶⁰

Though as a closer look reveals, both projects share fundamental assumptions as both rely, for instance, on a rather state-centric conception of the international – realism imagines world politics as a struggle for power between states; and Oppenheim’s legal positivism frames international law as the result of the practice of states.²⁶¹ In other words, *international law is a mirror of international politics*: as both accounts conceptualise international law in a formalist and voluntarist way where law operates mainly vertically and is only important when the international is dominated and tamed by a balance of power.

In comparison with the first context, i.e. the work of Schuman, Lasswell and Wright in the interwar period, there is not only a fundamental shift with regard to the way interdisciplinarity is conceptualised, but also with regard to how the ‘international’ is portrayed. While this second context of the ‘strange symbiosis’ of legal positivism and political realism still operates within the horizon of international *organization*, the meaning of international organization has changed: where the interwar generation conceptualised international organization as a move to (formal) inter-state institutions relying on a top-down perspective (i.e. international institutions guarantee peace, stability and even justice), the post-Second World War generation imagines international organization through the figure of the (informal institution of the) balance of power and works thus through

Richard Falk’s and Saul Mendlovitz’ *World Order Models Project* (often referred to with the acronym WOMP) was situated at the intersection of IL and IR and produced, inter alia, a couple of important collections of essays; on the other side of the Atlantic, the main figures of the English school such as Martin Wight or Hedley Bull devoted in-depth chapters in their central monographs to the study of (the Grotian tradition of) international law and emphasised the relevance of international law as an institution to maintain international order; and, in IL the two in the United States prevailing process-oriented schools, the New Haven school (around McDougal and Lasswell) and the Manhattan school (represented, for example, by Louis Henkin, Oscar Schachter and, later, Thomas Franck), as well as functionalist (William Coplin, Gidon Gottlieb, Francis Boyle) and sociological frameworks (Julius Stone) attempted to push the analysis of international law more towards politics and the social sciences, respectively.

²⁶⁰ The notion of ‘schism’ is taken from: Francis Anthony Boyle, *World Politics and International Law* (Durham: Duke University Press, 1985), chap. 1.

²⁶¹ On the differences and similarities between political realism and legal positivism see also J. D. Armstrong, Theo Farrell, and Hélène Lambert, *International Law and International Relations* (Cambridge: Cambridge University Press, 2007), 78–83.

a bottom-up approach (i.e., create peace, stability and legitimacy when they pursue their national interest).²⁶² As a consequence, the 'heroic figures' of this period is not the social and legal engineer located in Geneva anymore, but it is now the prudent statesman, the diplomat (maybe as lawyer-diplomat) or the foreign policy officer working in Washington, London or Moscow.

4. Liberalism and Moderate Constructivism: Interdisciplinarity as Colonialization

Although these early projects of interdisciplinarity between IR and IL have important repercussions until the present day on the relationship between both disciplines and how each of these disciplines imagines the other, I will turn now to more recent interdisciplinary projects. These projects differ from earlier accounts as they explicitly work with the concept of interdisciplinarity. In other words, the period of 'proto'-interdisciplinarity is over. This explicit treatment of interdisciplinarity does however not result, as we will see in this section in a less 'political' relationship between both disciplines. The difference is only, that in these explicit interdisciplinarity the 'politics of interdisciplinarity' seems to be better hidden. And maybe it is even worse, as I will outline, we are moving from interdisciplinarity as 'strange symbiosis' towards interdisciplinarity as 'colonization'. In particular, I will focus on the different guises of liberalism and of moderate constructivism.

4.1 A Starting Point: Regimes

It were only the late 1970s and the early 1980s, which saw a revival of international law within IR. Here, in particular the literature on *complex interdependence* and, developing from it, the debate about *international regimes* began to change the disciplinary confines of IR significantly and provided an

²⁶² It should be the 'neo-realist' critique of the 'levels of analysis', which re-establishes a top-down perspective of the international. Yet, for neo-realists not international organizations but the logic of anarchy is the driving force of the international. For a summary of the neo-realist critique, see, for example, Kenneth N. Waltz, 'Realist Thought and Neorealist Theory', *Journal of International Affairs* 44, no. 1 (1990): 21-37.

important starting point for a couple of interdisciplinary research projects between scholars from IR and IL. In this context, the concept of ‘complex interdependence’ presents, on the one hand, an attempt to move beyond the neo-realist mainstream with its emphases on ‘national interest’ and security issues but relied, on the other hand, on scientific positivism as underlying theory of science as well as on the assumption that the international system is in its basic structure anarchical and mainly composed of states.²⁶³ The same holds true for the literature on regimes. The notion of regimes was for the first time introduced to IR in the context of a research project conducted by Ernst B. Haas and John Gerard Ruggie, which examined the consequences and ‘collective responses’ of states towards the transboundary impacts of scientific and technical developments.²⁶⁴ Yet, it was only a special issue published in 1982 in *International Organization*, which established the concept firmly in the discipline (though, varying to some degree from the previous work of Haas and Ruggie). One of the reasons for the success of ‘regimes’ was surely Stephen Krasner’s seminal definition of the concept, which should become perhaps the most famous definition of a concept in IR’s history at all. According to this definition, regimes are

“sets of implicit and explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of facts, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions of

²⁶³ The most important elaboration of this strand of literature is still Robert O. Keohane and Joseph S. Nye, *Power and Interdependence*, 3rd ed. (New York: Longman, 2004). The first edition came out in 1977.

²⁶⁴ Interestingly, the notion of international regimes was introduced together with ‘epistemic communities’, another concept, which should become highly popular in IR and which was, originally, derived from Michel Foucault. Ruggie, for instance, defines these concepts as follows: ‘In depicting the ‘collective response’ of states to collective situations occasioned by science and technology, I will differentiate among three levels of institutionalization: (1) the purely cognitive, which I will call ‘epistemic communities;’ (2) that consisting of sets of mutual expectations, generally agreed-to rules, regulations and plans, in accordance with which organizational energies and financial commitments are allocated, and which we are calling ‘international regimes;’ and (3) international organizations. Most of our case studies focus on the second of these, the construction and transformation of international regimes. I also touch upon the other two, so as to demonstrate their interrelationships’, John Gerard Ruggie, ‘International Responses to Technology: Concepts and Trends’, *International Organization* 29, no. 3 (1975): 557–83. The concept plays also an important role in Keohane and Nye’s influential 1977 monograph, see in particular Keohane and Nye, *Power and Interdependence*, chap. 3.

action. Decision-making procedures are prevailing practices for making and implementing collective choice”.²⁶⁵

Using this definition as a vantage point, the main concern among students of international regimes was now whether regimes matter – and this issue was pursued in the vocabulary of *empirical social sciences* driven by the question whether regimes should be conceived as *intervening*, *independent* or *dependent variables*;²⁶⁶ whether one should analyse the ‘supply’ or ‘demand’ side of regimes;²⁶⁷ whether game theory could add something in order to better explain the effectiveness of regimes and cooperation;²⁶⁸ and so on: the turn to regimes established a large playground to develop theories and hypotheses on international regimes and cooperation as well as a largely welcomed opportunity to test those theories and hypotheses empirically.

However, one point is striking in this context: although the language of procedures, principles, rules (just remember Krasner’s specification of rules as ‘specific *prescriptions* of action’) and norms (these are, according to Krasner, ‘standards of behaviour defined in terms of *rights* and *obligations*’) heavily resembled key terms of the international legal discourse, “much of the work on ‘regimes’”, as Nicholas Onuf and James Taulbee point out, “has consciously avoided the traditional language of international law while borrowing extensively from its conceptual base”.²⁶⁹ This is even more perplexing as the “concept of regimes was borrowed from international law” where we can trace back its trajectory for at least 150 years.²⁷⁰ Yet, for some authors such as Anne-Marie Slaughter the avoidance of linking law and regimes more explicitly was not considered as a

²⁶⁵ Stephen D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, *International Organization* 36, no. 2 (1982): 186.

²⁶⁶ Cf. Krasner, 189–194.

²⁶⁷ Robert O. Keohane, ‘The Demand for International Regimes’, *International Organization* 36, no. 2 (1982): 325–55; and Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

²⁶⁸ See the special issue on ‘Cooperation under Anarchy’ introduced by Kenneth A. Oye, ‘Explaining Cooperation Under Anarchy: Hypotheses and Strategies’, *World Politics* 38, no. 1 (1985): 1–24.

²⁶⁹ Nicholas Onuf and James Larry Taulbee, ‘Brining Law to Bear on International Relations Theory Courses’, *PS: Political Science and Politics* 26, no. 2 (1993): 250.

²⁷⁰ Joseph S. Nye, ‘Neorealism and Neoliberalism’, *World Politics* 40, no. 2 (1988): 240. On the history of the concept of regimes in international legal discourse which can be traced back at least until the first part of the 19th century, see Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006), 18–19.

research gap but as a “brilliant tactical move” in the game of scientific practice as in the light of “the existing schism between international lawyers and international political scientists, any attempt to study international institutions from outside the reigning paradigm would have been ignored from the outset”.²⁷¹ From this point of view the regimes literature provided a valuable starting point for many interdisciplinary projects, not only between IR and IL, but also between other fields, as it helped, according to Oran Young, “to identify constructive opportunities for reintegrating the subfields of international politics, economics, law, and organization”.²⁷² In the remainder of this section, I will scrutinize two strands of research which emerged from the regimes literature and which constitute today the most successful ‘mainstream’ accounts when it comes in IR to discuss topics linked to the field of international law and the question of fruitful interdisciplinary research between IR and IL. I will start with the (neo)liberal “IL/IR”²⁷³ literature (4.2 and 4.3) and then turn to moderate constructivist approaches (4.4).

4.2 Of Agendas, Optics and Compliance: Imagining Interdisciplinarity

Although the notion of regimes played, as noted, an important role in debates within IR from the early 1980s onwards, only by the end of that decade and throughout the early 1990s discussions between IR and IL turned into more *explicit* interdisciplinary projects. In this subsection, I will concentrate on projects among liberal and/or institutionalist scholars from both disciplines.²⁷⁴ In the broader context of regimes and institutionalism it was Kenneth W. Abbott, with a journal article that is today often referred to as the ‘prospectus’ (the whole title of the piece was *Modern International Relations Theory: A Prospectus for International*

²⁷¹ Anne-Marie Slaughter-Burley, ‘Law and the Liberal Paradigm in International Relations Theory’, *Proceedings of the Annual Meeting (American Society of International Law)* 86 (1992): 182.

²⁷² Oran R. Young, ‘International Regimes: Toward a New Theory of Institutions’, *World Politics* 39, no. 1 (1986): 105.

²⁷³ I take the label ‘IL/IR’ from Jeffrey L. Dunoff and Mark A. Pollack, ‘International Law and International Relations: Introducing an Interdisciplinary Dialogue’, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 3–32.

²⁷⁴ I come back later in this chapter to early cooperative projects among representatives of ‘moderate’ constructivism as well as proponents of different process-oriented schools and address, then, potential interdisciplinary projects between ‘radical’ constructivism and ‘critical’ legal scholars (which I extend to the next chapter).

Lawyers) and a number of subsequent publications, who was the first to welcome interdisciplinary scholarship between IR and IL in a more explicit way.²⁷⁵ Throughout these publications Abbott aimed, on the one hand, to introduce “modern International Relations theory” to IL in order to overcome the “international lawyers’”, as he calls it, “narrow positivism”.²⁷⁶ In this regard, Abbott argues here that particularly the regimes literature “offers a long-overdue opportunity to reintegrate IL and IR”.²⁷⁷ But, on the other hand, IR would also benefit from such a ‘collaboration’ as IL could provide IR with, as Abbott writes, “an immense reservoir of information about legal rules and institutions, the raw material for the growth and application of theory”.²⁷⁸ This kind of division of labour between both disciplines becomes also clear in the following quote:

“At its present stage of development, IR is heavy on theory, but relatively light on empirical application and testing. IL can bring to the table a wealth of data, on legal practices and procedures, primary rules of conduct, secondary rules of law formation, interpretation and application, and so on”.²⁷⁹

In particular, regime theory’s offspring *neoliberal institutionalism* seems for Abbott promising in order to bring both disciplines together (again).²⁸⁰ According to Abbott such a collaboration could make both disciplines in the end “part of a larger interdisciplinary ‘rationality project’” based on insights from *rational choice theory*, which in turn draws heavily on economics and game theory.²⁸¹ Subsequently, the literature on ‘law and economics’ is for Abbott the role model to follow when it

²⁷⁵ Cf. Kenneth W. Abbott, ‘Modern International Relations Theory: A Prospectus for International Lawyers’, *Yale Journal of International Law* 14 (1989): 335–411; Kenneth W. Abbott, ‘Elements of a Joint Discipline’, *Proceedings of the Annual Meeting (American Society of International Law)* 86 (1992): 167–72; and Kenneth W. Abbott, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts’, *The American Journal of International Law* 93, no. 2 (1999): 361–79.

²⁷⁶ Abbott, ‘Modern International Relations Theory: A Prospectus’, 340.

²⁷⁷ Abbott, 238.

²⁷⁸ Abbott, 338.

²⁷⁹ Abbott, ‘Elements of a Joint Discipline’, 169.

²⁸⁰ And here it is Robert Keohane’s work or as Abbott admits, ‘Bob Keohane has been my guru’, Abbott, 170.

²⁸¹ Abbott, ‘Modern International Relations Theory: A Prospectus’, 340; see also: ‘Modern IR theory would supplement that approach [i.e., IL] with a broader scholarly perspective based on a rational choice model of state interaction’, Abbott, 340–341.

comes to the overall structure of interdisciplinary collaboration.²⁸² Such an endeavour could even be the cornerstone of a “joint discipline” between IL and IR, a discipline that “might be called the study of organized international cooperation”.²⁸³ During the 1990s Abbott should further develop this approach into a, as he coins it, “international governance theory”²⁸⁴ where he focused for example on the question of the institutional design of international organizations.²⁸⁵

Other scholars, such as Anne-Marie Slaughter and Robert Keohane, should soon join this early claim of pursuing explicit interdisciplinary project between IR and IL. For example, Slaughter famously observed that “[i]nternational law and international politics cohabit the same *conceptual space*” and should thus engage in interdisciplinary research as it becomes increasingly visible that “it makes little sense to study one without the other”.²⁸⁶ To advance this argument, Slaughter even rewrites the history of both disciplines since the 1950s: according to Slaughter’s historical sketch, IL was since the end of the Second World War mainly reacting to IR’s “realist challenge”.²⁸⁷ Yet, it is striking here that Slaughter constrains the list of historical IL approaches opposing the ‘realist challenge’ to American approaches that study law already as a social science: the New Haven school around McDougal and Lasswell, Falk’s World Order Models Projects as well as the process approach of Chayes and Chayes, Henkin and others.²⁸⁸ European or more positivist inclined accounts are not mentioned by Slaughter at all.

²⁸² Cf. Abbott, ‘Modern International Relations Theory: A Prospectus’, 376; Abbott, ‘Elements of a Joint Discipline’, 169; Abbott, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts’, 365–366.

²⁸³ Abbott, ‘Elements of a Joint Discipline’, 168.

²⁸⁴ Cf. Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’, *The American Journal of International Law* 92, no. 3 (1998): 384.

²⁸⁵ The latter often in collaboration with Duncan Snidal. See, for example, Kenneth W. Abbott and Duncan Snidal, ‘Why States Act through Formal International Organizations’, *Journal of Conflict Resolution* 42, no. 1 (1998): 3–32.

²⁸⁶ Slaughter, ‘International Law in a World of Liberal States’, 503 (emphasis added); see also: ‘IR and IL scholars seem increasingly to see the same world outside their office windows’, Slaughter, Tulumello, and Wood, ‘International Law and International Relations Theory’, 370.

²⁸⁷ Anne-Marie Slaughter-Burley, ‘International Law and International Relations: A Dual Agenda’, *The American Journal of International Law* 87 (1993): 207.

²⁸⁸ Slaughter-Burley, 207–220; see also Slaughter-Burley, ‘Law and the Liberal Paradigm in International Relations Theory’, 181; and Slaughter, ‘International Law in a World of Liberal States’, 503.

Moreover in order to overcome the historically grown tensions between IR and IL, two recent developments or ‘agendas’ in IR are promising according to Slaughter: institutionalism and liberalism. *Institutionalism* is here represented by the regimes literature and in Abbott’s rationality project. According to Slaughter, institutionalism is promising as

“[i]nstitutionalists and international lawyers subscribe to a common *ontology* of the international system: the actors, the structure within these actors act, and the process of interaction. Both groups, separately and together, are describing a common agenda focused on the *study of improved institutional design for maximally effective international organizations, compliance with international obligations, and international ethics*”.²⁸⁹

As Slaughter explains, this theoretical development was important in order to rid of the ‘realist challenge’: “Reinventing international law in rational-choice language stopped the traditional ‘Realist-Idealist’ debate cold. ‘Efficiency and transparency’ are hardly legalist-moralist sentiments”.²⁹⁰

However, for Slaughter institutionalism comes also with a number of problems as it is not capable to explain the emergence and change of regimes, neglects the role of individuals in international affairs and does not crack open the black box of states in order to study the role and impact of domestic policy beyond the state. In this context, as Slaughter remarks, the literature on ‘democratic peace’ has pioneered international thought as it has shown that the domestic level plays an important role in international relations.²⁹¹

²⁸⁹ Slaughter-Burley, ‘International Law and International Relations: A Dual Agenda’, 207; see also: ‘Considerable common ground exists already; many remaining obstacles are matters as much of semantics as of convictions’, Slaughter-Burley, 226.

²⁹⁰ Slaughter-Burley, ‘International Law and International Relations: A Dual Agenda’, 220. See also Slaughter, ‘International Law in a World of Liberal States’, 507.

²⁹¹ Cf. Slaughter-Burley, ‘International Law and International Relations: A Dual Agenda’, 225–226; and Slaughter, ‘International Law in a World of Liberal States’, 509–511.

It is here, where *liberalism* – the ‘agenda’ Slaughter herself prefers – comes in.²⁹² Importantly, liberalism and institutionalism do not exclude each other and constitute together a *dual agenda* where “the Liberal agenda *complements* the Institutional [..]. In sum, the dual agenda is a unified agenda”.²⁹³ In interdisciplinary terms liberalism could help to further “forge a new interdisciplinary bridge” between IR and IL.²⁹⁴ Yet, for Slaughter, it is important to stress that she understands the new liberal agenda not as a renaissance of an old-fashioned “‘Wilsonian ‘liberal internationalism’” of the interwar period, which according to her represents the *normative* strand of liberal thinking, but instead as a *positive* theory, which is based on the tradition of *scientific positivism*.

As Slaughter continues, the new liberal agenda should now focus on the causes and effects of “how States do behave rather than how they should behave”.²⁹⁵ Slaughter explains the behaviour of states by referring mainly to domestic factors as “the most distinct aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States based on their domestic political structure and ideology”.²⁹⁶ Slaughter follows here Andrew Moravcsik’s outline of liberalism as a distinct approach in IR that centres around three basic assumptions: first, that “society is analytically prior to the state” and, consequently, that states are not unitary actors; second, that “society consists of functionally differentiated private individuals and groups who act to promote their interests”, which means that individuals and groups can build transnational ties (important in this regard is the emphasis of the *disaggregation of the state*); finally, that the “behavior of states [...] reflects the nature and configuration of state preferences as shaped by domestic and transnational forces”.²⁹⁷

²⁹² The approach is later coined ‘liberal agency theory’, see Slaughter, Tulumello, and Wood, ‘International Law and International Relations Theory’, 384.

²⁹³ Slaughter-Burley, ‘International Law and International Relations: A Dual Agenda’, 206 (emphasis in the original).

²⁹⁴ Slaughter-Burley, 227; see also Slaughter-Burley, ‘Law and the Liberal Paradigm in International Relations Theory’.

²⁹⁵ Slaughter, ‘International Law in a World of Liberal States’, 508; for a critical reflection of the use of ‘liberalism’ in IL see Gerry Simpson, ‘Two Liberalisms’, *European Journal of International Law* 12, no. 3 (2001): 537–71.

²⁹⁶ Slaughter, ‘International Law in a World of Liberal States’, 504.

²⁹⁷ Slaughter-Burley, ‘Law and the Liberal Paradigm in International Relations Theory’, 183; see also Slaughter-Burley, ‘International Law and International Relations: A Dual Agenda’; and

This shift in perspective – in particular, the invocation of liberal IR theory with its rejection of state-centrism and the state-as-unitary-actor model – has also strong repercussions on Slaughter’s concept of law. As Slaughter explains, international law

“comprises all the law that regulates activity across and between territorial boundaries. It can include the law of peoples and the law of nations, the *jus gentium* and *jus inter gentes*. Existing categories and distinctions such as public and private, domestic, transnational and international are immaterial. The identifying element that qualifies a rule or set of rules for inclusion in this category is the potential for contributing to international order, whether by constraining domestic forces that might otherwise escalate international disputes into military or severe economic conflict, by strengthening or regulating transactions in transnational society, or by directly regulating inter-State relations. The resulting body of ‘law’ is defined not according to subject or source, but rather in terms of purpose and effect, in conformity with a particular body of international relations theory”.²⁹⁸

By following such a concept of international law, Slaughter investigates, for more than twenty years by now, the empirical consequences (‘purpose and effect’) of the liberal agenda. As I am interested in this section only in Slaughter’s notion of interdisciplinarity, suffice is to say here Slaughter’s research agenda is mainly centred around two general themes: first, the role of decentralized “transgovernmental networks” consisting of regulators, legislators and judges in processes of global governance and, second, the role of *judges* in the “constitutional cross-fertilization” of international law through domestic courts. According to

Slaughter, ‘International Law in a World of Liberal States’, 508; Moravcsik presented his approach most comprehensively in Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’, *International Organization* 51, no. 4 (1997): 513–53.

²⁹⁸ Slaughter, ‘International Law in a World of Liberal States’, 516.

Slaughter judges have become pivotal in the development and the constitution of a “global community of courts”.²⁹⁹

Let me turn now briefly to a third important project of liberal institutionalism in the intersection of ‘IL/IR’, namely Robert Keohane’s ‘two optics’. Where Slaughter speaks of a ‘dual agenda’, Keohane introduces the idea of “two optics”.³⁰⁰ The talk of the ‘two optics’, however, works slightly different as the one of the ‘dual agenda’. For Keohane, the starting point and main concern for students in the intersection of IL and IR should be the issue of *compliance*, i.e. “why governments do or do not keep commitments”.³⁰¹ In this context, Keohane attempts to sharpen our understanding of compliance by introducing a ‘scientific’ vernacular which treats compliance as a “dependent variable” and tries to *explain* why states comply (or do not comply) with international agreements.³⁰² The literature on compliance as Keohane maps it can be differentiated into two camps or, as he calls it, ‘optics’ which try to explain compliance and to outline its “causal pathway”.³⁰³ On the one hand, there is an “instrumentalist optic” which is shared by most political scientists (IR scholars constituting a subfield of it) and which “focuses on interests and argues that rules and norms will matter only if they affect the calculations of interests by agents”;³⁰⁴ on the other side, however stands a “normative optic”, which is the prevailing position in IL (together with a few IR scholars such as in particular Friedrich Kratochwil) and where compliance is understood as an outcome of discourse (producing persuasion and legitimacy) and

²⁹⁹ Cf. Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); and Anne-Marie Slaughter, ‘A Global Community of Courts’, *Harvard International Law Journal* 44, no. 1 (2003): 191–219.

³⁰⁰ Robert O. Keohane, ‘International Relations and International Law: Two Optics’, in *Power and Governance in a Partially Globalized World*, ed. Robert O. Keohane (London: Routledge, 1996), 117–30.

³⁰¹ Robert O. Keohane, ‘Compliance with International Commitments: Politics within a Framework of Law’, *Proceedings of the Annual Meeting (American Society of International Law)* 86 (1992): 176. For an in-depth discussion of compliance, which is addressed more to an IL audience, see the special issue introduced by Jose E. Alvarez, ‘Why Nations Behave’, *Michigan Journal of International Law* 19, no. 2 (1998): 303–17. Yet, as Benedict Kingsbury suggests “[c]ompliance with law is an important but elusive concept’ because it has different meanings in different theoretical contexts, Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’, *Michigan Journal of International Law* 19, no. 2 (1998): 368. Kingsbury is able to show this by discussing different concepts of law and different theoretical streams in international legal scholarship.

³⁰² Keohane, ‘Compliance with International Commitments’, 176.

³⁰³ Keohane, ‘Two Optics’, 123.

³⁰⁴ Keohane, 119.

where “norms have causal impact”.³⁰⁵ Put differently, Keohane is in the end puzzled by the question whether interests or discourse shapes our behaviour and causes compliance with international commitments and international (legal) norms.³⁰⁶

Yet, for Keohane, both approaches come with their genuine shortcomings. In a “crude version of instrumentalism”³⁰⁷ every action can be rationalised *ex post* because both compliance and non-compliance can be explained in terms of states’ interests. Such a concept of rationality is problematic for two reasons: first, “if all behavior is by definition rational, the concept of ‘rationality’ becomes meaningless”;³⁰⁸ second – and more importantly –, it makes empirical testing impossible as rationality cannot be conceptualised in a clear and unambiguous way.³⁰⁹ However, the ‘normative optic’ is according to Keohane far more problematic as it is unclear whether discourse works in a different way than *reputation*, which constituted one of the key terms of rational choice approaches in the early regimes debate.³¹⁰ Yet, the central flaw of the ‘normative optic’ is that it conceptualises norms as *counterfactually valid*. But if we move from compliance to validity as litmus test whether something is legal or not, we lose the possibility of empirical testing exercises.

In this aspect Keohane’s ‘two optics’ resemble, of course, his earlier distinction between “rationalist” and “reflective” approaches, which he developed in light of the meta-theoretical debate between positivism and post-positivism in the late 1980s and where “reflective” approaches should be assessed on the basis of criteria established by an empirically-driven version of the “rationalist” tradition – the latter, for Keohane, best represented in a ‘research program’ (of

³⁰⁵ Keohane, 120.

³⁰⁶ For an attempt that attempts to integrate both within its concept of compliance see: Abram Chayes and Antonia Handler Chayes, ‘On Compliance’, *International Organization* 47, no. 2 (1993): 175–205; and Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1998), chap. 1.

³⁰⁷ Keohane, ‘Two Optics’, 119.

³⁰⁸ Robert O. Keohane, ‘Rational Choice Theory and International Law: Insights and Limitations’, *The Journal of Legal Studies* 31, no. S1 (2002): 308.

³⁰⁹ Keohane, ‘Two Optics’, 120.

³¹⁰ On ‘reputation’ see, for instance, Robert Axelrod and Robert O. Keohane, ‘Achieving Cooperation under Anarchy: Strategies and Institutions’, *World Politics* 38, no. 1 (1985): 226–54.

what he understands) in the Lakatosian fashion.³¹¹ With the ‘two optics’ it seems to be the same, as the ‘normative optic’ (represented by IL and ‘reflective’ IR approaches) should help to answer a research question, which is only relevant for the larger project of an *empirical social science* (constituted mainly by the instrumentalist optic). Nevertheless, the apparent imbalance and hierarchy between the two optics does not prevent Keohane from claiming that “instrumental and normative incentives work in tandem with each other” and that both of the ‘two optics’ should provide the ground for a “productive synthesis”.³¹²

4.3 Legalization, Legitimacy and the Design of Institutions

The most prominent results of these attempts to practice interdisciplinarity under the auspices of liberalism, institutionalism and liberal institutionalism were certainly the research projects on the ‘legalization of world politics’, on which I touched at the outset of the introductory chapter already, and on legitimacy from a liberal institutionalist perspective. This means also that it would be wrong to perceive approaches that run under such labels as ‘liberalism’, ‘institutionalism’ and ‘liberal institutionalism’ as fundamentally different – something Slaughter in her attempt to break IR into three approaches (institutionalism, realism and liberalism) seems to indicate.³¹³ Rather, the boundary between the liberal and institutionalist camps are blurred – if it even makes sense to speak of different camps. The project of ‘legalization’ is a good example in this regard as it assembles *inter alia* Abbott and Slaughter (both holding formal degrees in law) as well as political scientists such as Keohane, Moravcsik and Snidal. In a similar vein as it did already almost 20 years earlier with the literature ‘international regimes’,

³¹¹ Robert O. Keohane, ‘International Institutions: Two Approaches’, *International Studies Quarterly* 32, no. 4 (1988): 379–96; Keohane’s standard(ization) of science was outlined most comprehensively in Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton: Princeton University Press, 1994).

³¹² Keohane, ‘Two Optics’, 128.

³¹³ It is interesting to pay attention on how Slaughter introduces these approaches: she addresses in her writings institutionalism first, then realism and finally liberalism. The textual practice of separating institutionalism and liberalism by putting realism in the middle generates the impression that both approaches – institutionalism and liberalism – constitute the opposing poles of a spectrum of IR theories addressing legal issues. And, as three seems by academic conventions to be a sufficient number of approaches, it seems not to be necessary to include or even mention other schools and approaches.

International Organization, the flagship journal of American IR, devoted a special issue to the “legalization of world politics”.³¹⁴

In this special issue the proponents of ‘legalization’ observe that “in many issue areas the world is witnessing a move to law” and that this transformation is heavily affecting international institutions.³¹⁵ International institutions are defined almost identically as ‘international regimes’ before, namely as “enduring sets of rules, norms, and decision-making procedures that shape the expectations, interests, and behaviour of states”.³¹⁶ The concept of legalization itself is then indirectly defined by the introduction of three “criteria”, “components”, “elements”, “levels” or “dimensions” (read: *variables*) which are “obligation”, “precision” and “delegation”.³¹⁷ Moreover, obligation, precision and delegation should not be understood as binaries but in terms of gradation: the higher these variables are, the more issue-areas and institutions are ‘legalized’ and, the more they are ‘legalized’, the higher their rate of compliance becomes.³¹⁸ Furthermore it is noted that if we understand legalization not as a binary it becomes also possible to capture the “variety of international legalization” on a global level.³¹⁹

According to this literature, the ‘legalization’ framework implies as well that one should not separate law and politics as “[l]aw and politics are intertwined at all levels of legalization”:³²⁰

“We view law as deeply embedded in politics: affected by political interests, power, and institutions. As generations of international

³¹⁴ See the introduction by Judith Goldstein et al., ‘Introduction: Legalization and World Politics’, *International Organization* 54, no. 3 (2000): 385–99; see also the various contributions in Bernhard Zangl and Michael Zürn, eds., *Verrechtlichung - Baustein für Global Governance?* (Bonn: Dietz, 2004).

³¹⁵ Goldstein et al., ‘Introduction’, 385.

³¹⁶ Goldstein et al., 387.

³¹⁷ ‘Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. Precision means that rules unambiguously defined the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules’, Kenneth W. Abbott et al., ‘The Concept of Legalization’, *International Organization* 54, no. 3 (2000): 401, (as we will see below the definition of those ‘criteria’ heavily resembles Thomas Franck’s criteria of ‘legitimacy’).

³¹⁸ Goldstein et al., ‘Introduction’, 387.

³¹⁹ Abbott et al., ‘The Concept of Legalization’, 405.

³²⁰ Abbott et al., 419.

lawyers and political scientists have observed, international law cannot be understood in isolation from politics. Conversely, law and legalization affect political processes and political outcomes. The relationship between law and politics is reciprocal”.³²¹

Consequently – and this is different to the special issue on ‘international regimes’ – ‘legalization’ is introduced as an explicit interdisciplinary project as it “creates *common ground* for political scientists and lawyers by moving away from a narrow view of law”.³²² In other words, ‘legalization’ seems to be “able to unite perspectives developed by political scientists and international legal scholars and engage in a genuinely collaborative venture”.³²³ Yet, at this point the question has to be asked whether the project of legalization represents really a ‘genuine *collaborative* venture’. I will come back to this issue in the conclusion of this section.

We can find a similar line of argumentation in the literature on *legitimacy and global governance*. For example, in a number of interdisciplinary collaboration Keohane and the philosopher of international law Allen Buchanan, attempted to develop a “complex standard of legitimacy” in order to design the “global governance institutions” of the future – with international law being part of these institutional arrangements or even being conceptualised as an institution in its own regard.³²⁴ What is new in this particular project is that Keohane and Buchanan limit their interest not only to an ‘*empirical*’ test of the legitimacy of these institutions where legitimacy is conceptualised as compliance with the rules of the institution(s) in case (which then translates, e.g., into the question of how we can measure the legitimacy of an institution or a legal rule). But Buchanan and

³²¹ Goldstein et al., ‘Introduction’, 387.

³²² Abbott et al., ‘The Concept of Legalization’, 402 (emphasis added).

³²³ Goldstein et al., ‘Introduction’, 387.

³²⁴ Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’, *Ethics & International Affairs* 20, no. 4 (2006): 405–37. On the idea that international law should be understood as an institution, see Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), 2. See also Robert O. Keohane, ‘Global Governance and Legitimacy’, *Review of International Political Economy* 18, no. 1 (2011): 99–109. For a longer discussion of the role of legitimacy in debates about global governance see Filipe dos Reis and Oliver Kessler, ‘The Power of Legality, Legitimacy and the (im)possibility of Interdisciplinary Research’, in *The Power of Legality: Practices of International Law and Their Politics*, ed. Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (Cambridge: Cambridge University Press, 2016), 99–124.

Keohane are rather interested in ‘*normative*’ research in order to provide a better design (by means of ‘standard of legitimacy’) for ‘global governance institutions’ as well as the institutionalisation of international law – now enhanced with more ‘legitimacy’.

Here, Buchanan and Keohane’s ‘complex standard of legitimacy’ is presented as an attempt to refuse, in a first step, three predominant views on the legitimacy of international law and institutions.³²⁵ Firstly, it turns against the idea that the consent of states alone, as it is the case for modern international law, creates legitimacy (this was, e.g., Henry Kissinger’s position). If we would follow this idea, legitimacy is simply equated with legality. According to Buchanan and Keohane this is however problematic as “many states are non-democratic and systematically violate the human rights of their citizens and are for that reason themselves illegitimate”.³²⁶ Secondly, they refuse the idea that the consent of democratic states enhances legitimacy to global governance institutions. In this case the chain of delegation (and therefore authorization) could become too long. In addition, democratic states are only accountable to their own citizens and not to all individuals affected by their decisions on a global scale – not to speak of some form of an emerging global *demos*.³²⁷ Such a limited scope of institutions composed of democratic states only would have as a consequence that most individuals, as they live in non-democratic states, would not be represented in those institutions. Thirdly, Buchanan and Keohane reject the view that a global democracy should be seen as the basis of a standard of legitimacy as it is difficult to imagine that there will be a global democracy in the near future, as there is at the moment no global public, no consensus (i.e. there is disagreement and uncertainty) about the normative framework of global common interest and – if liberal democratic principles should be the basis – there are no institutions (like free press and media), no active civil society and no mechanisms to check possible abuses of power of public institutions.³²⁸

³²⁵ cf. also Buchanan, *Justice, Legitimacy, and Self-Determination*, chap. 7.

³²⁶ Buchanan and Keohane, ‘The Legitimacy of Global Governance Institutions’, 413.

³²⁷ A further discussion of the question of accountability is provided in Ruth W. Grant and Robert O. Keohane, ‘Accountability and Abuses of Power in World Politics’, *American Political Science Review* 99, no. 01 (2005): 29–43.

³²⁸ Buchanan and Keohane, ‘The Legitimacy of Global Governance Institutions’, 417.

In order to overcome these difficulties Buchanan and Keohane articulate then, as a second step, their own standard by introducing “three substantive criteria” for legitimate global governance institutions.³²⁹ Firstly, in order to become legitimate global governance institutions should carry at least some kind of minimal moral acceptability. This means that – on a general level – global governance institutions should actively promote basic human rights (understood as physical security, liberty and the right to subsistence) and, if this is not the case already, they should at least not violate these basic human rights.³³⁰ Secondly, as the purpose of institutions is to provide benefits, which would not be generated without the institution, global governance institutions have to prove, in order to maintain their legitimacy, that their existence produces a comparative. Thirdly, all global governance institutions should carry, what Buchanan and Keohane coin, ‘institutional integrity’. For Buchanan and Keohane, ‘institutional integrity’ means that an institution will lose its legitimacy if “an institution exhibits a pattern of egregious disparity between its actual performance, on the one hand, and its self-proclaimed procedures or major goals, on the other”.³³¹ In order to guarantee these three criteria so-called epistemic virtues, understood primarily as transparency (to all parties involved) and accountability (also towards transnational civil society), should also be maintained.³³²

In a subsequent step, these rather general remarks on the legitimacy of global governance institutions are further specified and ‘applied’ – now mostly by Buchanan alone – to the field of international law.³³³ Here, Buchanan’s work on legitimacy is also part of a larger project on, as he terms it, “moral foundations of international law” or a, as he puts it somewhere else, “systematic moral view”.³³⁴ According to Buchanan, constitutes such a ‘systematic moral view’ a middle ground between natural law approaches, legal positivism and political realism. It

³²⁹ Buchanan and Keohane, 419.

³³⁰ Buchanan and Keohane, 420.

³³¹ Buchanan and Keohane, 422.

³³² Buchanan and Keohane, 424–429.

³³³ See in particular Buchanan, *Justice, Legitimacy, and Self-Determination*; see also Allen Buchanan, ‘The Legitimacy of International Law’, in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 79–96; and the collection of essays in Allen E. Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010).

³³⁴ Buchanan, *Justice, Legitimacy, and Self-Determination*, 15.

draws mainly on the tradition of analytic ethics. Buchanan illustrates the ‘moral foundations of international law’ by analysing, on the one hand, traditional topics of public international law such as the use of force or self-determination and secession but also, on the other hand, emerging topics such as democratisation by force or the discourse on human rights.

As Buchanan further argues, every moral theory of international law has to be grounded on justice and is hence holistic. By following mainly John Rawls, Buchanan distinguishes between ideal from non-ideal theories of justice. On the international level the “moral ideal should be a right’s protecting world state, *a system of genuine global governance*, not an improved multi-state system”.³³⁵ Such a ‘system of genuine global governance’ would not only guarantee human rights but also requires mechanisms of distributive justice and a democracy on a global scale. Yet, Buchanan is aware – as in his collaboration with Keohane – that such a system is not feasible at the moment and argues instead that a non-ideal system with a ‘justice-based conception of legitimacy’ at its core should be implemented. By referring to a ‘justice-based conception of legitimacy’, Buchanan stresses that he is concerned with “legitimacy in the normative sense, *not* with the conditions under which an entity is *believed* to be legitimate”.³³⁶ Thus, legitimacy is ‘justice-based’ or ‘normative’ when it is deducted from objective criteria. On the international level these criteria encompass those of the ‘complex standard of legitimacy’, which he had developed with Keohane. Buchanan emphasises in particular the importance of the compliance with human rights and the fact that a legitimate international system can be implemented in the best way through legitimate institutions and institutional reasoning – thus, for Buchanan: “[i]nstitutions matter”.³³⁷

What becomes also apparent in this discussion is that two things are fundamental in this attempt of a ‘normative’ underpinning of international law and global governance. First, Buchanan uses the notion of legitimacy in order to close (or create?) a gap between an ideal theory of international law (what he

³³⁵ Buchanan, 54 (emphasis added).

³³⁶ Buchanan, 235 (emphasis in the original). I will address ‘empirical’ notions of legitimacy (based, e.g., on a belief in legitimacy) below.

³³⁷ Buchanan, 23; see also Buchanan, ‘The Legitimacy of International Law’, 79–80.

pigeonholes as natural law approach) on the one hand and a view of the international legal order based on the mere consent of states on the other (equalled with political realism and legal positivism).³³⁸In other words, the power of the notion of 'legitimacy' is based on its flexibility and ability to oscillate between *is* (consent) and *ought* (justice). Second, this stream of the global governance literature fits perfectly into the wider project of 'humanity's law' as for Buchanan the main threshold – the problem that needs to be fixed – in order to achieve a just (i.e. ideal) system of international law is the state and, consequently, a state-oriented conception of international law that has to be overcome. This means also that situations might arise where international law might be formally valid and, at the same time, unjust. This is in particular the case when international law 'protects' human rights abuses of non-democratic states. Buchanan argues that in such circumstances what he calls "illegal legal reform" might be necessary in order to create a just international system of the future. 'Illegal legal reform' means that a conscious act of law-breaking might be morally demanded if the existing positive international law is unjust. Put differently, breaking the law might help to develop the law.³³⁹

4.4 Logics of Action, the Power of Human Rights and Moderate Constructivism

However, not only different streams of (neo)liberal institutionalism began to develop interdisciplinary projects in the intersection of international law and politics recently. Other important interdisciplinary projects are in particular linked to the different guises of *constructivism* in IR. Usually the relevant literature distinguishes between two versions of constructivism: between a 'thick' and a 'thin',³⁴⁰ a 'conventional' and a 'critical',³⁴¹ a 'soft' and a 'rule-oriented',³⁴² a 'soft'

³³⁸ Cf. Buchanan, *Justice, Legitimacy, and Self-Determination*, chap. 6.

³³⁹ Buchanan, 456–459. One of the cases Buchanan has in mind is NATO's 1999 Kosovo air operation. I will explore this case in more detail in chapter 7.

³⁴⁰ Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

³⁴¹ Ted Hopf, 'The Promise of Constructivism in International Relations Theory', *International Security* 23, no. 1 (1998): 171–200.

³⁴² Vendulka Kubáľková, 'The Tale of Two Constructivisms at the Cold War's End', *REGIS Working Paper*, 2001.

and a ‘radical’³⁴³ or a ‘moderate’ and a ‘radical’ version.³⁴⁴ As it was the case with the (neo)liberal ‘IL/IR’ literature the emergence of IR’s constructivism is closely tied to the regimes debate. Yet, while the ‘moderate’ version started mainly to problematize in the aftermath of the Cold War era the core assumptions of neoliberalism on the level of substantial theorizing (‘anarchy is what states makes of it’), the more radical version added to this critique of first-order theorizing a more fundamental critique also on the level of meta-theory. This move opened for the radical constructivist camp new avenues for an engagement with topics from general social theory and the philosophy of science by which it made radical constructivism an important part in IR’s fourth debate.³⁴⁵ While I will not dwell more on the differences between both versions of constructivism this point, I hope that the differences between them (in particular in their treatment of international law) become clear in the next chapter where I discuss the contours of the more radical version of constructivism more comprehensively.³⁴⁶

But let us have a look at the use of international law in moderate constructivism first. When it comes to the study of the role of international law, moderate constructivists attempt “to make visible the force of law through states’ compliance and, subsequently, the politics of law involved in their reasons for doing so/not doing so”.³⁴⁷ This kind of cognitive interest is strongly connected to the study of the evolution, spread, diffusion of and, particularly, compliance with *norms*.³⁴⁸ I will illustrate what this means by introducing two important research

³⁴³ Ronen Palan, ‘A World of Their Making: An Evaluation of the Constructivist Critique in International Relations’, *Review of International Studies* 26, no. 4 (2000): 575–98.

³⁴⁴ Oliver Kessler, ‘Sleeping with the Enemy? On Hayek, Constructivist Thought, and the Current Economic Crisis’, *Review of International Studies* 38, no. 2 (2012): 275–99.

³⁴⁵ Cf. Kubáľková, ‘The Tale of Two Constructivisms at the Cold War’s End’, 9.

³⁴⁶ Together with Oliver Kessler I have discussed this to a greater extent elsewhere: Filipe dos Reis and Oliver Kessler, ‘Constructivism and the Politics of International Law’, in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 344–64. For a different take to relate constructivism and international law, see also Jutta Brunnée and Stephen J. Toope, ‘Constructivism and International Law’, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 119–45.

³⁴⁷ dos Reis and Kessler, ‘Constructivism and the Politics of International Law’, 345–346.

³⁴⁸ The claim that constructivism is the study of norms has been put forward, for example, by Jutta Brunnée and Stephen Toope: ‘norm-interested IR thinkers have been labelled “constructivist”’, Brunnée and Toope, ‘Constructivism and International Law’, 119; similarly, Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 52, no. 4 (1998): 889–894. Moderate constructivists usually follow Peter Katzenstein’s suggestion to ‘use the concept of norms to describe collective expectations for the proper behavior of actors [...]’. In some situations norms operate like rules that define the identity of an actor, thus having

projects of moderate constructivism: the literature on the ‘power of human rights’ and attempts to identifying ‘legitimacy’ as a distinct logics of action. Here, the use of ‘legitimacy’ differs, as we will see, from the one in the context of neoliberal institutionalism.

The questions of *when, why and how norms ‘matter’* and *why states comply with international law* constitute the basis for moderate constructivist inquiries of international law. Moreover, the whole enterprise was conducted in the language of *empirical social sciences* as these approaches attempt to ‘bridge’ the divide between rationalist and reflective approaches in IR by establishing a ‘middle ground’, which means in turn to share a philosophy of science with the scientific positivist mainstream.³⁴⁹ A good starting point in order to better grasp the moderate constructivist take on international law is Margaret Keck and Kathryn Sikkink research on “transnational advocacy networks” and the role of these networks in the global politics of human rights.³⁵⁰ In Keck and Sikkink’s conceptualisation, transnational advocacy networks are mainly composed of actors of the ‘global civil society’ and are “organized to promote causes, principled ideas, and norms, and they often involve individuals advocating policy changes that cannot be easily linked to rationalist understanding of their ‘interest’”.³⁵¹ In other words, Keck and Sikkink identify *lacunae* or blind spots in the rationalist literature, namely that rationalism is not able to explain change and that it treats the interests of actors as black boxes.

In order to overcome these shortcomings of rationalism, Keck and Sikkink introduce the so-called “boomerang pattern”: if civil society actors in a country A

“constitutive effects” that specify what actions will cause relevant others to recognize a particular identity. In other situations norms operate as standards that specify the proper enactment of an already defined identity. In such instances norms have “regulative” effects that specify standards of proper behavior. Norms thus either define (or constitute) identities or prescribe (or regulate) behavior, or they do both’, Peter J. Katzenstein, ‘Introduction: Alternative Perspectives of National Security’, in *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter J. Katzenstein (New York: Columbia University Press, 1996), 5.

³⁴⁹ Martha Finnemore and Kathryn Sikkink, ‘Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics’, *Annual Review of Political Science* 4, no. 1 (2001): 391–416; see also Emanuel Adler, ‘Seizing the Middle Ground: Constructivism in World Politics’, *European Journal of International Relations* 3, no. 3 (1997): 319–63; and Jeffrey T. Checkel, ‘The Constructivist Turn in International Relations Theory’, *World Politics* 50, no. 2 (1998): 324–48.

³⁵⁰ Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), chap. 3.

³⁵¹ Keck and Sikkink, 8–9.

are not able to gain direct influence on policy outcomes like the implementation of human rights they may start to form a network in country B; after the establishment of such a network civil society actors in country B might increase the pressure on the policy elites of country B and, if necessary, on international organisations in order to intervene into the policy of state A. This intervention might then change the policy of state A.³⁵²

The work on transnational advocacy networks was further developed by Sikkink (now together with Martha Finnemore) into the “norm life cycle model” and the idea that norms are created, framed and promoted by “norm entrepreneurs”.³⁵³ For Finnemore and Sikkink norm entrepreneurs do not act out of egoistic self-interests as “it is very difficult to explain the motivation of norm entrepreneurs without reference to empathy, altruism, and ideational commitment”.³⁵⁴ Accordingly norm entrepreneurs are important for the emergence, spread and implementation of norms. This is illustrated by the ‘norm life cycle model’, where norms pass through three stages. During the first stage norms origin or emerge. At this stage the role of norm entrepreneurs is particularly relevant as norms “do not appear out of thin air; they are actively built by agents having strong notions about appropriate or desirable behavior in their community”.³⁵⁵ After getting enough support and trespassing a “threshold or tipping point” norms enter the second stage and, as Finnemore and Sikkink put it, “cascade” as more and more countries and organisations begin to support those norm. This stage can also be described as the phase of the “socialization” of norms.³⁵⁶ The ‘norm life cycle model’ enters its final stage when norms get “internalized”, i.e. when they “may become so widely accepted that they are internalized by actors and achieve a ‘taken-for-granted’ quality that makes

³⁵² Keck and Sikkink, 12–13.

³⁵³ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’, 894–909. For a recent example in IL explicitly referring to the literature on ‘norm entrepreneurs’, see Frédéric Mégret, ‘ICC, R2P, and the International Community’s Evolving Interventionist Toolkit’, *Finch Yearbook of International Law* 21 (2010): 21–53. Instead of ‘norm entrepreneur’, in IL the term ‘normative intermediary’ is used in a similar way, cf. Steven R. Ratner, ‘Does International Law Matter in Preventing International Conflict?’, *New York University Journal of International Law and Politics* 32 (2000): 591–698.

³⁵⁴ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’, 898.

³⁵⁵ Finnemore and Sikkink, 896.

³⁵⁶ Finnemore and Sikkink, 902.

conformance with then norm almost automatic”.³⁵⁷

Both mechanics, Keck and Sikkink’s ‘boomerang pattern’ as well as Finnemore and Sikkink’s three-stage ‘norm life cycle model’, were finally extended into a five-phase “spiral model”, which was introduced in the well-received edited volume on *The Power of Human Rights*.³⁵⁸ In the introductory chapter Thomas Risse and Kathryn Sikkink develop the theoretical framework of the volume, which is then applied without greater changes to several case studies in the remaining chapters (including studies of Sub-Saharan African, Arab, Latin American, South East Asian and East European cases). Risse and Sikkink are interested in the “impact of *ideas and norms* in international politics” and, here, particularly in the global impact of human rights ideas and norms.³⁵⁹

According to Risse and Sikkink human rights norms, if they are successfully implemented, undergo five phases: first, human rights norms are violated (“repression”) by a state (the “target state”) and this violation triggers the work of transnational advocacy networks (gathering information); second, while, on the one hand, the transnational advocacy networks start to disseminate information on the international level and to lobby, the target state, on the other hand, denies its involvement in the violation of human rights norms; third, if “international pressures continue and escalate” the ‘target states’ sees itself forced to make tactical concessions which, in turn, mobilize also domestic opposition;³⁶⁰ fourth, human rights norms achieve “prescriptive status”, i.e. the target state starts to ratify international protocols and to institutionalize human rights norms domestically; fifth and finally, human rights norms are completely internalized and we can observe fully “rule consistent behavior” by the target state.³⁶¹

Summing up, these three models – the ‘boomerang pattern’, the ‘norm life cycle model’ as well as the ‘spiral model’ – emphasise agency, where norm

³⁵⁷ Finnemore and Sikkink, 904.

³⁵⁸ Thomas Risse, Steve C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

³⁵⁹ Thomas Risse and Kathryn Sikkink, ‘The Socialization of International Human Rights Norms into Domestic Practices: Introduction’, in *The Power of Human Rights*, ed. Thomas Risse, Steve C. Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999), 6 (emphasis added).

³⁶⁰ Risse and Sikkink, 25.

³⁶¹ Risse and Sikkink, 17–34.

entrepreneurs exist and where even norms themselves are ascribed – by introducing certain metaphors – with agentic quality (as they spread, diffuse, cascade, etc.); norms even ‘live’.³⁶² Moreover, these models rely on a rather mechanical, uni-directional and teleological understanding of how norms work, as norms seem to follow a simple causal arrow.³⁶³ Yet, such a conception of norms neglects that norms are socially embedded and that the implementation of norms is part of a larger process of contestation between various, often adversarial projects.³⁶⁴

Beside the interest in the ‘life of norms’ and the ‘power of human rights’, moderate constructivists are extensively dedicated to further investigating agency and focus here on the underlying motives, i.e. the intensions, of international actors (mainly states). This research on *logics* or *rationalities of action* is orientated on the by now classic question of the research on *compliance*, namely the question of “why do powerful states obey powerless rules?”.³⁶⁵ By asking this, moderate constructivist are able to build bridges into two directions: on the one hand, to *legal process* scholars in IL and their interest in the compliance question; and, on the other hand, to other ‘mainstream’ accounts in IR as the moderate constructivist logic of actions literature claims to only complement the already existing explanations of states’ behaviour (traditionally either coercion or interest) by adding a genuine constructivist logic. For instance, where Keohane explains compliance in terms of states’ self-interest, moderate constructivist scholars suggest that – at least in some cases – states also follow another logic – might it be called ‘logic of appropriateness’, a ‘logic of persuasion’, a ‘logic of arguing’ – or

³⁶² Cf. Bernd Bucher, ‘Acting Abstractions: Metaphors, Narrative Structures, and the Eclipse of Agency’, *European Journal of International Relations* 20, no. 3 (2014): 742–65.

³⁶³ Adriana Sinclair presents a comprehensive critique of the idea that norms work like an uni-directional causal arrow. Sinclair points, in particular, to the possibility of ‘normative backsliding’, see Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge: Cambridge University Press, 2010), chap. 6.

³⁶⁴ See the important criticism in: Antje Wiener, *A Theory of Contestation* (Heidelberg: Springer, 2014).

³⁶⁵ The classic formulation is from Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (New York: Columbia University Press, 1979). For more recent restatements in IL see Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990); and Harold Hongju Koh, ‘Why Do Nations Obey International Law?’, *Yale Law Journal* 106 (1997): 2599–2659. For IR see Ian Hurd, ‘Legitimacy and Authority in International Politics’, *International Organization* 53, no. 2 (1999): 379–408.

because they perceive a norm as 'legitimate'.³⁶⁶ In this context particularly the concept of 'legitimacy' was warmly welcomed as an opportunity to conduct common research in IL and IR.³⁶⁷

Interestingly, in contrast to the legal and political discourse of the nation state, the notion of legitimacy was for a long time almost absent from both IL and IR. Although there were some exceptions, such as Kissinger's rather loose use of legitimacy (see above), the concept was substantially introduced to IR only in 1999 by an influential article by Ian Hurd published in *International Organization*.³⁶⁸ Hurd asks at the outset of the article, "[w]hat motivates states to follow international norms, rules, and commitments?".³⁶⁹ This puzzles Hurd as the fact that states 'comply' with 'norms, rules and commitments' – and in later publications he should increasingly focus on *legal* norms, rules and commitments ('the rule of law')³⁷⁰ – runs fundamentally against the assumption that states operate (or 'dwell') under the condition of international anarchy, i.e. without a central mechanism that could sanction non-compliance. To shed light to the compliance question, Hurd uses as his main example the "institution of sovereignty". Sovereignty is understood here as non-intervention and mutual recognition; and, according to Hurd, virtually all states comply with this foundational 'institution' of the international system.³⁷¹

Traditional approaches, which either rely on coercion (e.g., classical realism) or interest (e.g., neorealism or neoliberalism) as rationale of action, are according to Hurd not able to explain such a high rate of compliance with the

³⁶⁶ Cf. James G. March and Johan P. Olsen, 'The New Institutionalism: Organizational Factors in Political Life', *The American Political Science Review* 78, no. 3 (1984): 734–49; Nicole Deitelhoff and Harald Müller, 'Theoretical Paradise – Empirically Lost? Arguing with Habermas', *Review of International Studies* 31, no. 1 (2005); and Thomas Risse, "'Let's Argue!': Communicative Action in World Politics', *International Organization* 54, no. 1 (2000): 1–39.

³⁶⁷ For a longer discussion of 'legitimacy' in IR and IL see: dos Reis and Kessler, 'Power of Legality, Legitimacy and the (im)possibility of Interdisciplinary Research'; as well as dos Reis and Kessler, 'Constructivism and the Politics of International Law', 351–354. For a discussion, which focuses mainly on IL see: Filipe dos Reis and Oliver Kessler, 'Legitimacy', in *Fundamental Concepts of International Law: The Construction of a Discipline*, ed. Jean d'Aspremont and Sahib Singh (Cheltenham: Edward Elgar, forthcoming).

³⁶⁸ Hurd, 'Legitimacy and Authority in International Politics'.

³⁶⁹ Hurd, 379.

³⁷⁰ Cf. Ian Hurd, *How to Do Things with International Law* (Princeton: Princeton University Press, 2017).

³⁷¹ Hurd, 'Legitimacy and Authority in International Politics', 393–399.

institutions of sovereignty. Only a distinct constructivist logic of action is able to grasp this and Hurd identifies this logic with 'legitimacy'. Hence, legitimacy is presented as the missing link to answer the compliance puzzle. As Hurd argues legitimacy is linked to the

"the normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor's *perception* of the institution. The actor's perception may come from the substance of the rule or from the procedure or source by which it was constituted. Such a perception affects behavior because it is internalized by the actor and helps to define how the actor sees its interests."³⁷²

Thus, Hurd's concept of legitimacy works differently than the one of Buchanan and Keohane, as Hurd employs an 'empirical' concept of legitimacy. This means that not predefined 'objective' criteria but the 'subjective' perception – the Weberian legitimacy belief (*Legitimitätsglaube*) – determine whether a rule or institution is legitimate. Moreover, legitimacy has an intimate relationship with authority as the belief in the legitimacy of a rule or institution provides the rule or institution with authority.³⁷³

According to Hurd, it has important implications if it is possible to show that the compliance with rules and institutions on the international level is – at

³⁷² Hurd, 381 (emphasis in the original).

³⁷³ For a still strong critique of the idea to perfectly distinguish between the 'empirical' (or 'descriptive') and the 'theoretical', see Charles Taylor, 'Interpretation and the Science of Man', *Review of Metaphysics* 25, no. 1 (1971): 3–51. As Taylor nicely demonstrates, empirical research is always based on normative assumption; similarly, normative research rests always on empirical observations. See also the slightly different argument by William E. Connolly: 'To describe a situation is not to name something, but to characterize it. [...] A description does not refer to data or elements that are bound together merely on the basis of similarities adhering in them, but to describe is to characterize a situation from the vantage point of certain interests, purposes, or standards. To describe is to characterize from one or more possible points of view, and the concepts with which we so characterize have the contours they do in part because of the point of view from which they are formed', William E. Connolly, *The Terms of Political Discourse*, 3rd ed. (Oxford: Blackwell, 1994), 22–23. As a result, as Connolly famously called it, all concepts are 'essentially contested' and, as a corollary of the contested nature of concepts, our neo-Kantian dichotomies – and Max Weber was certainly the 'master' of these dichotomies – 'break down'. Connolly's examples are synthetic/analytical, operational/non-operational, scientific language/ordinary language or normative/empirical; one could, of course, also add process/substance, see, in particular, Connolly, chap. 1.

least to some extent – evoked by their legitimacy. As Hurd explains, this would make the assumption, that the international system is anarchical, obsolete: “If we accept that some authoritative international institutions exist, by virtue of being accepted by states as legitimate, then the international system is not an anarchy”.³⁷⁴ It would then also soften the sharp separation between the domestic and the international as two completely different spheres or levels as the international would then be, like the domestic, governed “by structures that rely on normative pull to enforce their edicts”.³⁷⁵ Yet, this does not mean that the international and the domestic work completely identical. While the domestic is governed by centralised authority, the international could better be described as a “system of decentralised authority”.³⁷⁶

Hurd’s concept of legitimacy is ‘empirical’ in another sense as well, namely as he actually tests whether the ‘institution of sovereignty’ is perceived as legitimate by states. Yet as a direct access to the motivations of states and their representatives is not possible – “as it is impossible to enter into an actor’s head”³⁷⁷ –, Hurd suggests to prove the underlying rationale of states’ actions indirectly. Hurd asks here whether it is possible to fully explain the persistence of sovereignty (understood as non-intervention) by just focussing on self-interest or coercion as possible explanations. In particular, he asks why should such a powerful hegemon as the United States respect the sovereignty of its neighbour Canada? According to Hurd explanatory models based on self-interest or coercion are not able to explain this and he concludes consequently that the United States do not interfere into Canada’s sovereignty as they have a general believe in the legitimacy of the ‘institution of sovereignty’.³⁷⁸

When we turn to IL, it was the work of Thomas M. Franck that introduced the concept of legitimacy in the late 1980s and early 1990s to the discipline.³⁷⁹ Franck was one of the most significant figures of the so-called

³⁷⁴ Hurd, ‘Legitimacy and Authority in International Politics’, 401.

³⁷⁵ Hurd, 401.

³⁷⁶ Hurd, 401.

³⁷⁷ Hurd, 382.

³⁷⁸ See Hurd, 383–399.

³⁷⁹ It was particularly his monograph, Franck, *The Power of Legitimacy Among Nations*; for earlier studies see Thomas M. Franck, ‘Legitimacy in the International System’, *The American Journal of*

Manhattan School, a school that pursued the agenda of bringing the US process tradition together with a liberal world-view.³⁸⁰ As it was the case for Hurd, Franck is interested in the compliance question.³⁸¹ And as for Hurd, Franck answers this question with reference to 'legitimacy': "legitimacy is assigned the role of an independent variable" to explain why states follow the rules of international law. The competing variable is mainly 'coercion'.³⁸² Where Franck differs from Hurd is the definition of legitimacy as Franck argues that legitimacy "is a property of a rule or rule-making institution which itself exerts a pull towards compliance", he continues by addressing the role of community, "on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process".³⁸³

Moreover Franck distinguishes sharply between legality and legitimacy and keeps in this regard one of the core assumptions of legal positivism alive, namely that legality operates through a binary logic where something is either legal or not – *tertium non datur*.³⁸⁴ The legitimacy of a rule is, in contrast, always a "matter of degree".³⁸⁵ In order to grasp legitimacy and to make it observable, Franck develops four indicators (also functioning as variables), which are determinacy (semantic clarity), symbolic validation (pedigree and rituals), coherence (consistency with other rules) and adherence (validation of a rule in accordance with secondary rules). As legitimacy is a 'matter of degree' one can evaluate now the 'legitimacy' of a rule or rule-making institution vis-à-vis the degree of the fulfilment of the four indicators.³⁸⁶ What is noteworthy in this context is the circularity of Franck's argument and the interplay between subjective beliefs and objective criteria as subjective beliefs produce objective criteria, which in turn produce subjective beliefs.

International Law 82, no. 4 (1988): 705–59; and Thomas M. Franck, 'Why a Quest for Legitimacy?', *UC Davis Law Review* 21 (1988): 535–47.

³⁸⁰ For an excellent introduction to the work of Franck and the framework of the Manhattan School, see David Kennedy, 'Tom Franck and the Manhattan School', *New York University Journal of International Law and Politics* 35, no. 2 (2003): 397–435.

³⁸¹ "What if the evolution of a system of rules ordinarily obeyed by states were possible without a coercive infrastructure?", Franck, *The Power of Legitimacy Among Nations*, 22.

³⁸² Franck, 25.

³⁸³ Franck, 24; see also: 'Legitimacy [...] is about right process and about community', Franck, 38.

³⁸⁴ Franck also distinguishes (as Buchanan) legitimacy from justice, see Franck, *The Power of Legitimacy Among Nations*, chap. 13.

³⁸⁵ Franck, 37, 43.

³⁸⁶ Such an approach resembles of course the one of the legalization literature.

Although both, Hurd (standing for IR) and Franck (standing for IL) address similar puzzles, it was only the work of Jutta Brunnée and Stephen Toope, which started to bring both disciplines explicitly together and repeatedly used the language of ‘interdisciplinarity’. Brunnée and Toope’s project is to develop an “interactional account of international law”, which is interdisciplinary as it is an attempt to marry IL with IR’s moderate constructivism and Lon Fuller’s neo-naturalist legal theory.³⁸⁷ The authors are in particular interested in the concept of “international legal obligation” as they “believe that the key to understanding the role that law plays in international society lies in understanding the nature and operation in practice of legal obligation”.³⁸⁸

International legal obligation is created when three things come together. Firstly, Brunnée and Toope borrow from the moderate constructivist literature on norms the idea of ‘shared understanding’. Here, they engage with Finnemore and Sikkink’s ‘norm life cycle model’ (which I discussed above), the literature on ‘epistemic communities’ and Emanuel Adler’s take on ‘communities of practices’.³⁸⁹ These different strands of constructivist literature point out that “[s]ocial norms can only emerge when they are rooted in an underlying set of shared understandings”.³⁹⁰ Shared understandings create also *social legitimacy*. Secondly, although all ‘legal norms’ are ‘social norms’, not all ‘social norms’ are ‘legal norms’. In order to distinguish ‘legal norms’ from non-legal norms, Brunnée and Toope introduce Fuller’s work to international legal theory. Fuller, whose approach was published in the context of domestic debates in US legal theory taking place mainly during the 1950s, identified a number of criteria, which (if

³⁸⁷ See Jutta Brunnée and Stephen J. Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’, *Columbia Journal of Transnational Law* 39 (2000): 19–74; Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010); and Jutta Brunnée and Stephen J. Toope, ‘Interactional International Law: An Introduction’, *International Theory* 3, no. 2 (2011): 307–18.

³⁸⁸ Brunnée and Toope, *Legitimacy and Legality in International Law*, 6.

³⁸⁹ On ‘epistemic communities’ see the special issue introduced by Peter M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, *International Organization* 46, no. 1 (1992): 1–35; on ‘communities of practice’ see Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (London: Routledge, 2005).

³⁹⁰ Brunnée and Toope, ‘Interactional International Law’, 309; cf. Brunnée and Toope, *Legitimacy and Legality in International Law*, chap. 2.

fulfilled) would create fidelity to law.³⁹¹ If law fulfils these criteria it would also help to create specific *legal legitimacy*.³⁹² To connect legality to a number of criteria helps Fuller to overcome a hierarchical conception of law. It is exactly this non-hierarchical conception, which Brunnée and Toope identify empirically on the international level. Thirdly, only the permanent *practice of legality* in the interaction of the various actors of the international scenery – Brunnée and Toope explicitly leave the state-centrism of traditional international law behind and include non-state actors – can make legal norms legitimate and hence sustainable.

4.5 Interim Conclusion

In order to conclude the reconstruction of various recent interdisciplinary research projects between ‘mainstream’ accounts in both disciplines – either in the context of liberal ‘IL/IR’ or the moderate constructivism – let me point to three implications.³⁹³

First, interdisciplinarity is easier said than done. In this regard my discussion of the concept of legitimacy should be indicative. This means that simply the “reference to the same concept does not constitute an interdisciplinary research agenda”.³⁹⁴ As we have seen, a concept like legitimacy conveys different meaning in different contexts (as it oscillates, e.g., between objective criteria and subjective

³⁹¹ Fuller identified eight criteria which are generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking for the impossible, constancy and congruence between rules and official action, Lon L. Fuller, *The Morality of Law*, Rev. ed. (New Haven: Yale University Press, 1969).

³⁹² Brunnée and Toope, *Legitimacy and Legality in International Law*, 52–55.

³⁹³ As I said at the outset of this chapter, my reconstruction of different interdisciplinary projects between IR and IL is limited to a few exemplary episodes and cases. In particular, I did not address two important recent developments in the liberal ‘IL/IR’ literature. First, key IR figures of the ‘legalization of world politics’ movement, such as Keohane and Zürn, increasingly try to ‘repoliticize’ international law and thereby leaving step-by-step the common agenda with their liberal counterparts in IL. Second, we can observe an ‘empirical turn’ in the compliance literature. ‘Empirical’ means in this context to test the compliance with international law by using quantitative methods and large-n case studies. For a critical reconstruction of the first development, see Anna Leander and Wouter Werner, ‘Tainted Love: The Struggle over Legality in International Relations and International Law’, in *The Power of Legality: Practices of International Law and Their Politics*, ed. Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (Cambridge: Cambridge University Press, 2016), 77–87; and, for the second development, see Jakob V.H. Holtermann and Mikael Rask Madsen, ‘Toleration, Synthesis or Replacement? The “Empirical Turn” and Its Consequences for the Science of International Law’, *Leiden Journal of International Law* 29, no. 4 (2016): 1001–19.

³⁹⁴ dos Reis and Kessler, ‘Power of Legality, Legitimacy and the (im)possibility of Interdisciplinary Research’, 114.

feelings or between substance and procedures) and, hence, works differently: while Franck was mainly interested in how rules and rule-making institutions create compliance and thereby to answer a perennial question of US policy approaches in IL, namely the question of 'why do powerful states obey powerless rules?'; although Hurd took up a similar question his main concern was to show that the international system is rather a 'system of decentralised authority' than of anarchy, which in turn also helped him in disciplinary terms to bridge between rationalistic and constructivist approaches in IR; for Keohane and Buchanan 'legitimacy' helped to design more effective institutions of global governance as well as they saw it as a promising device to trespass disciplinary boundaries between normative and empirical research; and for Brunnée and Toope examining the concept of legitimacy was useful in order to create an account of 'international legal obligation' which should fuse insights from legal theory with IR's moderate constructivism. Importantly as we can also see, all of these projects have certain disciplinary dimensions.

Second, all of these projects are attempts to move beyond the traditional image of the international, which was so persistent in both IR and IL. Instead of conceptualizing and problematizing the international in terms of international organization these new interdisciplinary projects turned to an image of the international as *global governance*.³⁹⁵ As we have seen – for example, in the literature on regimes or the 'empirical' research with regard to legitimacy – projects of global governance are not an entire renunciation of the traditional image of the international but, rather, challenge a few – yet important – assumptions. Although the international is often still recognized as anarchical, the emergence of regimes or the diagnosis that legitimacy and law might matter somehow 'softens' the hopeless nature of the international. Connected to this observation, states are not conceived as main actors of international politics anymore as *global governance* directs our attention to the role of 'transnational advocacy networks', courts, multinational enterprises and the whole plethora of international institutions. Consequently, the 'heroic figures' are not the statesmen, diplomats or foreign affairs officers of the Cold War era anymore but for example

³⁹⁵ The first part of this paragraph draws mainly on Kessler, 'World Society', 102–103.

the human rights activist, the judge or even the bureaucrat. In disciplinary terms this created a demand for ‘empirical’ research evaluating the compliance with international rules and commitments – with international *legal* rules and international *legal* commitments as prime examples – as it created at the same time a demand for an engagement with ‘normative’ analyses in order to create the most effective, efficient and democratic – in short, legitimate – institutions for the future.

However, there is still another disciplinary dimension to all of this. This brings me to my third and probably most important point. In all the different ‘mainstream’ projects, which I traced back, we can observe a certain imbalance between the disciplines of IR and IL – mostly to the disadvantage of the lawyers. As we will see in the next section, the imbalance led critical IL scholars to articulate the claim that IR ‘conquers’ IL and that IL, in order to maintain its own disciplinary core (whatever this might be), should start to engage in the project of ‘counterdisciplinarity’. The claim that interdisciplinary projects are often projects of “colonialization” is, however, nothing new when we look at the history of various ‘law and ...’ endeavours, which often started promising but later turned into ‘law as...’ misunderstandings.³⁹⁶ But how does interdisciplinary ‘colonialization’ exactly work here? Before I pursue this question in light of the work of critical scholars from both IR and IL in the next section and in the chapter’s conclusion, I think it is a good starting point to look first at the language, which is often mobilised in interdisciplinary projects. As James Boyd White has observed on a more general level, interdisciplinary projects between law and other fields are usually framed in *territorial* and/or *mechanical metaphors* – and these metaphors create in the end disciplinary hierarchies.³⁹⁷

The ‘hierachisation’ of disciplines through these metaphors works in different forms: Firstly, many interdisciplinary projects *reify* disciplinary boundaries instead of overcoming these boundaries (i.e. ‘breaking down boundaries’). This is the case as disciplines are not conceptualised as *social practices* with contested and blurred

³⁹⁶ Cf. Jack M. Balkin, ‘Interdisciplinarity as Colonization’, *Washington and Lee Law Review* 53 (1996): 949–70.

³⁹⁷ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), 12–17.

boundaries but as *pre-given* and *naturalized* containers or “‘fields’—as though there were entities out there in the world, perhaps like a patchwork quilt of agricultural fields seen from an airplane, among with connections”.³⁹⁸ Secondly, interdisciplinary work is often captured in the language of *findings*. We have seen various attempts to bring findings – mainly IR’s findings – to IL (e.g. the findings of ‘modern IR theory’, ‘liberalism’ or ‘moderate constructivism’). This image does not only reify disciplines but it also reifies the findings itself as it seems that one could transfer findings from one disciplines to another as one could “pass a plate with the truth on it over to the law, which would then in some unspecific way put it to use (or vice versa)”.³⁹⁹ Yet, to use the language of findings in this way neglects the fact that findings remain already *within* disciplines never uncontested and are never transhistorically valid.⁴⁰⁰ Contesting findings is actually the way scientific practice works. Finally, we have seen how the metaphor of ‘intellectual method’ is mobilised, i.e. that “one learns from another discipline not its ‘findings’ but its methodology, which can be brought like a machine to problems of one’s own field, upon which it will go to work without undergoing any transformation.”⁴⁰¹ In the present chapter we have witnessed different uses of these metaphors and how they, in turn, produce disciplinary hierarchies between IR and IL – often with the request that IL should incorporate the *methods* and *theoretical* findings of IR or that IR should concentrate more on the *empirical* findings of IL (but hardly, the other way around). This is of course the logic of subsumption at its best. Such way of relating disciplines was already put forward in the very first publication – the foundational document so to say – of the recent ‘IL/IR’ movement as the full title of Abbott’s ‘prospectus’ reveals: ‘Modern International Relations Theory: A Prospectus for International Lawyers’.⁴⁰² Moreover, it is important to note that the discipline that ‘does the theory’ or ‘exports’ its findings or methods is the one that decides what kind of research is relevant (e.g., what constitutes a valid case,

³⁹⁸ White, 13. For accounts to study science as practice see inter alia Bruno Latour, *Science in Action: How to Follow Scientists and Engineers through Society* (Cambridge, MA: Harvard University Press, 1987); and Michael Lynch, *Scientific Practice and Ordinary Action: Ethnomethodology and Social Studies of Science* (Cambridge: Cambridge University Press, 1993). For a discussion of IR, see Friedrich Kratochwil, ‘The Monologue of “Science”’, *International Studies Review* 5, no. 1 (2003): 124–28.

³⁹⁹ White, *Justice as Translation*, 13.

⁴⁰⁰ See Poovey, *A History of the Modern Fact*.

⁴⁰¹ White, *Justice as Translation*, 14.

⁴⁰² Cf. Tanja E. Aalberts, ‘The Politics of International Law and the Perils and Promises of Interdisciplinarity’, *Leiden Journal of International Law* 26, no. 3 (2013): 505.

argument or research questions) and how research should be conducted. Yet, at this point one could, of course, ask whether we can overcome disciplinary hierarchies at all? To engage with this question, let's have a look on how critical scholars from both disciplines scrutinized the different 'mainstream' projects – and how the puzzle of interdisciplinarity is approached – and whether a more reconstructive mode of disciplinary linking is possible.

5. From Interdisciplinarity to Counterdisciplinarity – and Back?

To recapitulate, I have introduced and discussed so far three different projects of interdisciplinary research between IR and IL. The first one was provided by the Chicago-based authors Frederick Schuman, Harold Lasswell and, especially, Quincy Wright and their attempt to make both IR and IL more scientific by invoking an external 'third': 'social sciences'. As a second project, I discussed the 'strange symbiosis' between legal positivism and political realism after the beginning of the Second World War. Although both approaches seem at first sight incompatible with each other, as the possibility of their very existence is the denial of the 'other' and, therefore, seem antagonistic to interdisciplinary research; yet, a closer look reveals that they created a 'strange symbiosis' as they engage in a (hidden) division of labour *exactly* because the condition of possibility is the denial of the other. The third context brought us to a number of more recent debates. Here the division of labour between both disciplines (as in particular the terms 'dual agenda' or 'two optics' imply) seems to be clear and *prima facie* a project among 'equal partners'. However, a second view reveals as we have seen in my discussion from 'regimes' to 'legalization', from the 'the power of human rights' to different uses of 'legitimacy' among liberal and soft constructivist scholars that these projects are rather to understand as hegemonic projects in disguise as they impose the perspective – the theory and method – of IR on the empirical field of international law (rather than discussing on equal footing with the cognate field of IL).

From a methodological point of view, what I have done so far was not to 'fix' the meaning of the term 'interdisciplinarity' by providing a once or for all

definition and by establishing at least a preliminary working definition. As I understand science as a social practice (and, thus, its guiding concepts as contingent, socially embedded and permanently contested), I rather reconstructed the *practice* of interdisciplinary research and the *use* of the term in various contexts.⁴⁰³ In the remainder of this section, I will focus on some prominent criticisms of the recent wave of interdisciplinary mainstream scholarship between IR and IL. However, I will not leave it there as I will argue that interdisciplinary research can actually work – not framed as collaboration between different ‘disciplines’ but rather as an engagement between scholars with similar ‘metatheoretical’ (in particular, epistemological and methodological) orientations. On a side note, this is not only the case between but also within disciplines. To advance my argument I will focus in particular on the debate on ‘counter-disciplinarity’ and make use of the notion of ‘translation’.

The recent wave of interdisciplinary projects in the mainstream(s) of IR and IL was the object of harsh assessments by critical scholars from both disciplines. For instance, critical IL scholars began to fear a ‘colonialization’, ‘conquest’ and ‘instrumentalization’ of their field through IR.⁴⁰⁴ Particularly Martti Koskenniemi has been among the most ardent critics of these interdisciplinary projects during the past fifteen years. Koskenniemi’s (and to some extent also Jan Klabber’s) critique went so far that it culminated in the claim that IL scholars should start to engage in ‘counterdisciplinarity’ rather than in interdisciplinary projects with their colleagues from IR.⁴⁰⁵ To understand Koskenniemi’s position it is important to

⁴⁰³ For a similar but less developed argument, see Friedrich Kratochwil, ‘A Guide for the Perplexed? Critical Reflections on Doing Inter-Disciplinary Legal Research’, *Transnational Legal Theory* 5, no. 4 (2014): 541–56. See also: ‘Rather than focusing on the “inside” of disciplinary understandings - which of course are surrounded by other “islands of knowledge” - or by examining “bridges” that connect these islands, I focus on the processes by which these boundaries of “sense” are drawn and redrawn so that different elements can be included, reconfigured, or excluded’, Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014), 29 (emphasis in the original). See also Aalberts and Venzke, ‘Moving Beyond Interdisciplinary Turf Wars’.

⁴⁰⁴ On the vocabulary of ‘colonialization’ see my discussion in the conclusion of the previous section and: Balkin, ‘Interdisciplinarity as Colonization’; Koskenniemi speaks of ‘conquest’, see Martti Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’, *European Journal of International Relations* 15, no. 3 (2009): 410; and Martti Koskenniemi, ‘Law, Teleology and International Relations: An Essay in Counterdisciplinarity’, *International Relations* 26, no. 1 (2012): 16; on ‘instrumentalization’, see Jan Klabbers, ‘Counter-Disciplinarity’, *International Political Sociology* 4, no. 3 (2010): 309–310.

⁴⁰⁵ Cf. Koskenniemi, ‘Law, Teleology and International Relations’.

understand how he frames the (inter)disciplinary history of IL and IR.⁴⁰⁶ I have touched upon it already above when I introduced Morgenthau's work in the intersection of international law and politics and I will come back to it now.

According to Koskenniemi, the establishment of realism as the main paradigm and the role of Hans Morgenthau, as a European international lawyer leaving for US-American IR, was the moment when not just the positive relationship between IR and IL came to an end but – and this is for Koskenniemi certainly the bigger problem – when traditional IL, i.e. the European project of the 'gentle civilizer', began to fade out. While the European tradition of international legal thought was mainly interested in the formal validity of law, IR – and this is also true for US policy approaches in IL – increasingly started to follow a dynamic conception of law, where law is reduced to an outcome of policy and an epiphenomenon of the struggle for power. The result of this development is for Koskenniemi a *two culture problem*: while a "culture of dynamism" started to dominate IR (and IL's policy approaches), a "culture of formalism" was assigned on the other hand to the remains of the European tradition (particularly, legal positivism).⁴⁰⁷ And even recent liberal development in IR, which seem to be so distant on a substantial theoretical level (first-order theory) from the different forms of realism (as the 'liberal agenda' claims to oppose the 'realist challenge'), seem to share on a deeper theoretical level (second-order theory or metatheory) a dynamic image of international law.⁴⁰⁸

In this regard two developments even intensified the problem. First, the recent 'IL/IR' literature (as well as moderate constructivism) turned the "debate about the ends of action to the means of action, from normative *praxis* to instrumental *techné*".⁴⁰⁹ We shouldn't forget, however, that it was Morgenthau's critique in *Scientific Man vs. Power Politics* that was directed exactly against this kind of 'legal engineering'. Yet, for Koskenniemi this seems to be of less relevance. Second, the problem is not only of 'theoretical' nature. For Koskenniemi it is

⁴⁰⁶ See in particular Koskenniemi, *The Gentle Civilizer of Nations*, chap. 6.

⁴⁰⁷ Koskenniemi, 494–509.

⁴⁰⁸ For a valuable discussion of first-order and second-order theory - and their relationship, see Fred Chernoff, *Theory and Metatheory in International Relations: Concepts and Contending Accounts* (New York: Palgrave Macmillan, 2007).

⁴⁰⁹ Koskenniemi, *The Gentle Civilizer of Nations*, 486 (emphasis in the original).

important to note that the dynamic conception of law became closely connected to hegemonic projects in US academia and, moreover, of US foreign policy. In other words, for Koskenniemi, claims about interdisciplinarity turn easily into hegemonic projects, as he suggests in the following paragraph:

“Today, many lawyers in the United States persist in calling an integration of international law and international relations theory under a ‘common agenda’. This is an American crusade. By this, I do not mean only that some of the crusaders have chosen to argue for an increasing recourse to US principles of domestic legitimacy in the justification of its external behavior, nor that nearly all of the relevant literature comes from North America. [...] Nor am I relying on the fact that the concepts of ‘liberalism’ and ‘democracy’ refer back to an American understanding that links them with determined (Western) liberal institutions. What I want to say, instead, is that the interdisciplinary agenda itself, together with a deformed concept of law, and enthusiasm about the spread of ‘liberalism’, constitutes an academic project that cannot but buttress the justification of American empire [...]. This is not because of bad faith or conspiracy on anybody’s part. It is the logic of an argument [...] that hopes to salvage the law by making it an instrument for the values (or, better, decisions) of the powerful that compels the conclusion”.⁴¹⁰

These developments find their expression also in a turn in the international legal discourse towards a ‘managerialist’ vocabulary. One of the outcomes of managerialism is the growing relevance of experts and expert vocabularies on a global scale. I shall return to this later. Yet, Koskenniemi is also afraid of another consequence, namely that ‘managerialism’ leads to a re-definition and hence transformation of a number of key legal concepts into pure technical instruments – instruments helping to manage international affairs. Koskenniemi observes in this regard a couple of semantic drifts such as, e.g., from ‘institutions’ to ‘regimes’, from ‘rules’ to ‘regulation’, from ‘government’ to ‘governance’, from ‘responsibility’ to

⁴¹⁰ Koskenniemi, 483–483.

‘compliance’, from ‘law’ to ‘legitimacy’ and, in the end even, ‘lawyers’ become ‘international relations experts’.⁴¹¹

As for Koskenniemi these problems are so closely linked to the culture of IR, he consequently suggests a radical break from IL’s ‘sibling discipline’: instead of establishing interdisciplinary ‘IL/IR’ projects, IL should foster “counterdisciplinarity” as a project of critique.⁴¹² This project, in turn, should be tied to a wider ‘culture of formalism’. For Koskenniemi it is important to note that a ‘culture of formalism’ works differently than a simple return to formalism as it would present a “culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it. As such, it makes a claim for universality that may be able to resist the pull towards imperialism”.⁴¹³

Although other critical international legal scholars point into the same direction as Koskenniemi, they seem to be more moderate in the formulation of the consequences. For instance, Jan Klabbers speaks as well of ‘counter-disciplinarity’.⁴¹⁴ And, Klabbers starts with a similar diagnosis when he discusses for example Slaughter’s contribution to interdisciplinarity, which makes visible that “interdisciplinary scholarship, in a word, is about power, and when it comes to links between international legal scholarship and international relations, the power balance tilts strongly in favour of the latter”.⁴¹⁵ However, Klabbers does not go as far as Koskenniemi and does not completely deny that interdisciplinary scholarship between IR and IL might produce valuable results for both sides. For him, and I will argue the same towards the end of this section, collaborations between scholars from both disciplines are possible under certain

⁴¹¹ Koskenniemi, ‘Miserable Comforters’, 405–411.

⁴¹² Koskenniemi, ‘Law, Teleology and International Relations’.

⁴¹³ Koskenniemi, *The Gentle Civilizer of Nations*, 500; for further discussion, cf. Jan Klabbers, ‘Towards a Culture of Formalism? Martti Koskenniemi and the Virtues’, *Temple International and Comparative Law Journal* 27, no. 2 (2013): 417–35.

⁴¹⁴ Cf. Klabbers, ‘Counter-Disciplinarity’.

⁴¹⁵ Jan Klabbers, ‘The Bridge Crack’d: A Critical Look at Interdisciplinary Relations’, *International Relations* 23, no. 1 (2009): 120; and Jan Klabbers, ‘The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinary’, *Journal of International Law & International Relations* 1, no. 1–2 (2005): 35–48.

circumstances.⁴¹⁶ They are possible if we frame disciplines not as monolithic blocks anymore but rather as internally fragmented knowledge orders, which provide a centre stages for epistemic struggles between various (people with) projects. This means, for instance, that IR scholars inspired by Foucault can hardly cooperate with proponents of rational choice approaches in their own discipline – and the same might be true for IL as well. However, cooperation between Foucauldians or rational choicers beyond disciplinary boundaries should be on the first view easier as they share the same metatheoretical assumptions and a common world-view.

In a similar vein, the recent wave of liberal and soft constructivist interdisciplinary projects has been the object of repeated criticism within IR. From early onwards it were particularly *radical* constructivists who pointed to the flaws, biases and blind spots in the literature on ‘international regimes’.⁴¹⁷ As I pointed out at the outset of this thesis already, Friedrich Kratochwil and John Gerard Ruggie famously observed in the heydays of the regimes debate that in the prevailing approach to regimes “epistemology fundamentally contradicts ontology”.⁴¹⁸ Epistemology contradicts ontology as, on the one hand, regimes are defined in terms of rules, norms, principles and procedures, which all bear a *intersubjective* dimensions (in other words they are framed as having an *intersubjective ontology*), while, on the other hand, the mainstream protagonists of the regimes literature adheres to an image of science, which is heavily indebted to *scientific positivism* and its rather mechanical epistemology of thinking in arrows. As Kratochwil and Ruggie note, a positivist theory of science is ‘blind’ for the study

⁴¹⁶ Klabbers, ‘The Bridge Crack’d’, 123–124; similarly, Aalberts, ‘Perils and Promises of Interdisciplinarity’, 505–506; and Kratochwil, ‘A Guide for the Perplexed?’

⁴¹⁷ In my reconstruction of radical constructivism’s critique of mainstream interdisciplinary projects between IR and IL, I will mainly focus in the work of Kratochwil (and, by far, I cannot discuss all of his points). Kratochwil published repeatedly on this issue. See, for instance: Kratochwil, ‘How Do Norms Matter?’; Shirley Scott, Anne-Marie Slaughter, and Friedrich Kratochwil, ‘Legalization: Interpreting the Empirical Evidence’, *Proceedings of the Annual Meeting (American Society of International Law)* 96 (2002): 291–98; Friedrich Kratochwil, ‘The “Legalization” of World Politics?’, *Leiden Journal of International Law* 16, no. 4 (2003): 878–84; Friedrich Kratochwil, ‘International Law and International Sociology’, *International Political Sociology* 4, no. 3 (2010): 311–15; Friedrich Kratochwil, ‘How (Il)liberal Is the Liberal Theory of Law? Some Critical Remarks on Slaughter’s Approach’, *Comparative Sociology* 9, no. 1 (2010): 120–45; Kratochwil, ‘A Guide for the Perplexed?’; and Kratochwil, *The Status of Law in World Society*, chap. 1; for a discussion see Tanja E. Aalberts, ‘Interdisciplinarity on the Move: Reading Kratochwil as Counter-Disciplinarity Proper’, *Millennium* 44, no. 2 (2016): 242–49.

⁴¹⁸ Friedrich Kratochwil and John Gerard Ruggie, ‘International Organization: A State of the Art on an Art of the State’, *International Organization* 40, no. 4 (1986): 764.

of *meaning* and *validity* (and hence unable to grasp an intersubjective ontology of regimes adequately) as it infers explanations from the observation of behaviour. This is even worsened as the position of the observer is not reflected and the observer and the observed remain sharply divided. In particular the trend to treat norms as explanatory variables (in the tradition of *causa efficiens* causality) brings the positivist agenda into an unsustainable position as “unlike the initial conditions in positivist explanations, norms even can be thought of only with great difficulty as ‘causing’ occurrences”.⁴¹⁹ According to Kratochwil and Ruggie, we should thus abandon this mechanistic image of norms as norms

“may ‘guide’ behavior, they may ‘inspire’ behavior, they may ‘rationalize’ or ‘justify’ behavior, they may express mutual ‘expectations’ about behavior, or they may be ignored. *But they do not effect cause* in the sense that a bullet through the heart causes death or an uncontrolled surge in the money supply causes price inflation”.⁴²⁰

Moreover – and this is even more important – “norms are counterfactually valid”.⁴²¹ This means that non-compliance with norms does not invalidate a norm – even if non-compliance occurs repeatedly. As Kratochwil and Ruggie point out, this has far-reaching consequences for a model that treats “norms as ‘variables’—be they independent, dependent, intervening or otherwise—” as we cannot grasp the validity of a norm by focussing on its effectiveness (i.e., behavioural effects), which is logically deduced from game theoretical models and/or empirically measured through rates of compliance. Instead Kratochwil and Ruggie suggest that we should turn our focus to the *rationalization of behaviour within a specific context, namely the way the protagonists involved give reasons*:

“Precisely because state behavior within regimes *is* interpreted by other states, the rationales and justifications for behavior which are proffered, together with pleas for understanding or admissions of guilt, as well as the responsiveness to such reasoning on the part of other

⁴¹⁹ Kratochwil and Ruggie, 767.

⁴²⁰ Kratochwil and Ruggie, 767 (emphasis added).

⁴²¹ Kratochwil and Ruggie, 767.

states, all are absolutely critical component parts of any explanation involving the efficacy of norms. Indeed, the communicative dynamics may tell us far more about how robust a regime is than overt behavior alone”.⁴²²

As a logical consequence of this assessment, IR should abandon the positivist tradition of science and rather follow an “interpretive epistemology”.⁴²³ This kind of epistemology should become later a cornerstone of the more radical strand of ‘constructivism’.⁴²⁴ It is also an important example of the logic of reconstruction in IR. The main reason why IR has failed to overcome these blind spots and shortcomings of scientific positivism is a lack of knowledge about and engagement with central debates in other disciplines. Kratochwil, for instance, notes that “the subject of custom seems highly relevant to the regime discussion, but one cannot think that busy social scientists are about to rediscover the wheel. Worse still, there are justifiable suspicions that the wheel will not be discovered unless fundamental changes are made in the research program”.⁴²⁵

More than fifteen years later, Kratochwil diagnoses a similar maladjustment in the context of the literature on ‘legalization’: Even if the ‘empirical’ observation that there are “phenomena of legalization” (i.e., that ‘the world is witnessing a move to law’) is correct, the way of studying it, which was advanced by the authors of the special issue on the ‘legalization of world politics’, may be flawed.⁴²⁶ For Kratochwil, the legalization literature represents “a nearly autistic attempt to theorize about law and politics” as it lacks any engagement with the broad literature on law and legalization in social and legal theory (in particular, a discussion of the work of Jürgen Habermas and Niklas Luhmann is missing). In the

⁴²² Kratochwil and Ruggie, 767–768 (emphasis in the original).

⁴²³ Kratochwil and Ruggie, 772; on the study of norms from a radical constructivist perspective see also Kratochwil, ‘How Do Norms Matter?’; Antje Wiener has repeatedly published on the study of norms from a critical perspective, see, for example, Antje Wiener, ‘Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations’, *Review of International Studies* 35, no. 1 (2009): 175–93; and Wiener, *A Theory of Contestation*.

⁴²⁴ I will introduce early constructivist approaches and their way of studying international law more comprehensively in the next chapter.

⁴²⁵ Friedrich Kratochwil, ‘Thrasymachos Revisited: On the Relevance of Norms and the Study of Law for International Relations’, *Journal of International Affairs* 37, no. 2 (1984): 355.

⁴²⁶ See the remarks by Kratochwil in Scott, Slaughter, and Kratochwil, ‘Legalization’, 296; and Kratochwil, ‘The “Legalization” of World Politics?’

end, 'legalization' scholars postulate interdisciplinarity but they are unable to practice it, as they do not know what happens outside their own disciplinary turf.⁴²⁷

The failure to consider these essential literatures leads Kratochwil to the observation that the discussion has not moved on since the debate about regimes as norms are still "reduced [...] simply to 'hooks' – obviously a mechanical metaphor has then to carry all the weight in an 'explanation' – or they are treated as 'signals' for a commitment".⁴²⁸ In this context Kratochwil further elaborates on the radical constructivist critique of the mainstream model of norms. Kratochwil points out that, on the one hand, the proponents of legalization limit their analysis of legal obligation "to manifestations of legal behaviour", which is measurable in empirically driven research designs. This, however, "excludes precisely the 'pull' that results from the 'internal' point of view of law (Hart) that is constitutive of the legal enterprise". On the other hand, Kratochwil notes "the total neglect of language and narratives that frames 'law'". Both points produce also repercussions for interdisciplinary research as by "neglecting the problem of context, interpretation, and the peculiarities of the normative world, one cuts oneself off from some of the most interesting puzzles in an interdisciplinary dialogue".⁴²⁹

But, such a genuine interdisciplinary dialogue is easier said than done as it involves the willingness to move from an understanding of disciplines as monolithic blocks to 'epistemes' or 'communities of discourse'.⁴³⁰ And, as we have seen the two camps of IR and IL seem still to be "so close yet so far" in this regard.⁴³¹ This has primarily to do with the way critical scholars frame their own discipline but also 'the other'.⁴³² As Tanja Aalberts observes, critical scholars from both disciplines are mainly concerned with scrutinizing the mainstream in their

⁴²⁷ Kratochwil, 'The "Legalization" of World Politics?', 879.

⁴²⁸ Kratochwil, 879; see also Kratochwil, 'How Do Norms Matter?'

⁴²⁹ Kratochwil, 'The "Legalization" of World Politics?', 880.

⁴³⁰ On 'communities of discourse', see White, *Justice as Translation*, 15.

⁴³¹ Oliver Kessler, 'So Close Yet So Far Away? International Law in International Political Sociology', *International Political Sociology* 4, no. 3 (2010): 303–4. This essay is the introduction to a forum with contributions from 'critical' scholars from both IR and IL. The contributions discuss the possibilities and limits of interdisciplinary research.

⁴³² See on this also: Nikolas M. Rajkovic, 'The Space between Us: Law, Teleology and the New Orientalism of Counterdisciplinarity', in *The Law of International Lawyers*, ed. Wouter Werner, Marieke De Hoon, and Alexis Galan (Cambridge: Cambridge University Press, 2017), 167–96.

own or the other discipline instead of actually searching for intellectual cooperation partners among disciplines. Here, the example of Koskenniemi stands out as he seems to trap back into some kind of “hyper-disciplinarity” through his claim for ‘counterdisciplinarity’ – a claim, which is in the end, as Aalberts puts it, rather “a counter-IR-disciplinarity. Or more specifically, a counter-IR-as-an-American-social-science-disciplinarity”.⁴³³

Anna Leander and Wouter Werner rightly noticed in this regard that the call for ‘counter-disciplinarity’ is a “paradoxical return to law [...] in critical legal studies”.⁴³⁴ On the one hand, it is paradoxical, as it was critical scholarship in IL, which for so long not only acknowledged but actively promoted the importance of interdisciplinary work. In the case of Koskenniemi this is particularly perplexing as his own work has always been interdisciplinary: *From Apology to Utopia*, was “not only a book on international law” but also, as we can read in its second sentence, “an exercise in social theory and political philosophy”;⁴³⁵ and the *Gentle Civilizer* is heavily indebted to the literature on ‘the history of political thought’.⁴³⁶ What is also problematic here, is Koskenniemi’s representation of IR as it is, in the words of Mark A. Pollack, “at best an anachronism describing early Cold War IR of our grandfathers rather than the contemporary field, and at worst a distortion of IR scholars’ attitudes, aims, and influence on the legal profession”.⁴³⁷

Yet, Koskenniemi’s move is ‘paradoxical’ also for a second reason as it is Koskenniemi, who was always so closely linked to the project of the ‘politics of international law’, starting now to advocate a rather non-political concept of international law, which is grounded in a ‘culture of formalism’.⁴³⁸ But, such a non-political concept of (international) law hardly exists and formalism – even as a culture – will not protect international law from possible ‘pulls towards

⁴³³ Aalberts, ‘Interdisciplinarity on the Move’, 244.

⁴³⁴ Leander and Werner, ‘Tainted with Love’, 87.

⁴³⁵ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005), 1.

⁴³⁶ For a similar argument of Koskenniemi’s ‘selective use of interdisciplinarity’, see also Jeffrey L. Dunoff, ‘From Interdisciplinarity to Counterdisciplinarity: Is There Madness in Martti’s Method?’, *Temple International and Comparative Law Journal* 27, no. 2 (2013): 309–37; and Rajkovic, ‘The Space between Us’.

⁴³⁷ Mark A. Pollack, ‘Is International Relations Corrosive of International Law: A Reply to Martti Koskenniemi’, *Temple International and Comparative Law Journal* 27, no. 2 (2013): 340.

⁴³⁸ Cf. Leander and Werner, ‘Tainted with Love’, 87–96.

imperialism'. As Duncan Kennedy has noted in his discussion of the first globalization of law and legal thought, formalism is always socially and politically embedded as the language of formalism was part of (and enabled) left liberal as well as conservative political projects.⁴³⁹ Moreover, the turn to formalism helps also to reify disciplinary boundaries and to conceptualise disciplines as being homogeneous and having a clear core. In this context, Aalberts claim for *reflexive* interdisciplinarity, meaning that critical scholars should engage with critical projects in other disciplines, should be more than welcomed as it helps to move discussions onwards instead of again and again beating dead horses.⁴⁴⁰

An interesting hint, how interdisciplinary collaboration understood in terms of reflexive interdisciplinarity could work, has been given by Kratochwil. Throughout his work Kratochwil makes repeatedly, without further specifying it, use of the metaphor of *translation* when he points to the promises, problems and pitfalls of interdisciplinary research. Kratochwil writes, for instance: "interdisciplinary work will require considerable knowledge in at least two fields and the capacity to 'translate'".⁴⁴¹ In the remainder of this section, I argue that the notion of translation could open a promising avenue to overcome the 'mainstream' conception of interdisciplinarity. As suggested in the conclusion of the previous section, mainstream interdisciplinary projects – and, in particular the liberal exchange on regimes, legalization and legitimacy – resembles often more an one-way transportation or transplantation from one discipline to another: the findings or the method of one discipline is without greater 'adjustments' transplanted into another discipline.⁴⁴²

However, 'interdisciplinarity as translation' works differently. Of course, the meaning of the term 'translation' differs from context to context – and in

⁴³⁹ Kennedy, 'Three Globalizations of Law and Legal Thought', 25–37.

⁴⁴⁰ Aalberts, 'Perils and Promises of Interdisciplinarity'.

⁴⁴¹ Kratochwil, 'International Law and International Sociology', 313; see also Kratochwil, *The Status of Law in World Society*, 30; Kratochwil, 'A Guide for the Perplexed?', 550. Onuf uses in this context 'trafficking' in a similar way: Nicholas Onuf, 'The Politics of Constructivism', in *Constructing International Relations: The next Generation*, ed. Karin M. Fierke and Knud Erik Jørgensen (Armonk: M.E. Sharpe, 2001), 239.

⁴⁴² Mainstream accounts do not only rely on this view when they discuss the relationship between disciplines but also as we have seen in the literature on the 'power of human rights' when it comes to conceptualise norms – and even their image of language and communication is based on this view.

particular, the ‘norm diffusion’ literature might stick to an understanding of translation, which basically resembles translation as transportation – but, a thicker or more “radical”⁴⁴³ notion of translation, which we can find in different (social) theoretical literatures (ranging from semiotics to ANT, from post-analytical philosophy to hermeneutics, from feminist to postcolonial approaches, etc.) would instead highlight the productive, transformative and also contested nature of translations. To focus on translation, means then to concentrate on the ‘inter’ and thereby ‘open the black box’ of inter-disciplinarity. As Doris Bachman-Medick convincingly argues, translation

“can become a model for disciplinary linking, where the individual disciplines make themselves as susceptible as possible to connection with other areas of knowledge and explore their ‘contact zone’. In contrast to the ‘smoother’ category of interdisciplinarity, the translation category has the advantage of explicitly addressing the differences, tensions and antagonisms between disciplines or schools of thought”.⁴⁴⁴

Translation helps us, in other words, to focus on and recognize the politics of interdisciplinarity. It does so, as a ‘thicker’ notion of translation does not presuppose that there exists only the one and true translation (i.e. that translation is determinate and stable) but that translations are always ‘indeterminate’, fluid and unfinished.⁴⁴⁵ Translation is then a productive way to deal with indeterminacy and the politics of interdisciplinarity – it is productive as it does neither deny indeterminacy nor the political nature of interdisciplinarity. Put differently, *translation will not provide us with a tool to solve paradoxes, to eliminate power relations and to shed light into blind spots but it will enhance our vocabulary to*

⁴⁴³ William Van Orman Quine, *Word and Object* (Cambridge: MIT Press, 2013), 23.

⁴⁴⁴ Doris Bachmann-Medick, ‘Introduction: The Translational Turn’, *Translation Studies* 2, no. 1 (2009): 12.

⁴⁴⁵ The formulation that translation is ‘indeterminate’ is W. V. O. Quine’s. For Quine, the ‘indeterminacy of translation’ is a corollary of the ‘inscrutability of reference’, see Quine, *Word and Object*, chap. 2. Quine’s work on translation could be seen as the starting point of ‘post-analytical’ philosophy. For further discussion see also Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979), 192–209. To link translation and the work of critical scholars in IR and IL through such a notion of translation is also promising, as the ‘indeterminacy’ of international law provided the most important vantage point for radical constructivist research in IR as it did for critical legal studies in IL. I will discuss this more comprehensively in the next chapter.

make paradoxes, power relations and blind spots visible, analysable and criticisable – and thus helps us to ‘move on’.

To rely on the notion of translation has further consequences. First, to read interdisciplinarity through the lens of translation ‘weakens’ to some extent the claim that IR (or ‘law and...’ endeavours in general) ‘conquer’, ‘colonize’ and ‘instrumentalize’ IL (or the legal profession in general). If we take translation seriously, we cannot communicate without translation. Interdisciplinary communication is thus always part of processes of translation(s). At least a ‘colonial semiosis’ is happening.⁴⁴⁶ Or, if we go one step further: As Gunther Teubner persuasively argues in a general assessment of the ‘law and ...’ research, this kind of research does not present a ‘colonization’ of law by the humanities or by social sciences such as economics, sociology or political science. Rather, Teubner suggests that it should be understood as an attempt to translate ideas, concepts, theories and methods of these disciplines into legal language. As such, the various forms of ‘law and ...’ research should be understood as “*legal reconstructions*” of the humanities or social sciences – something that resembles the way lawyers reconstruct, describe and explain a ‘world out there’ when analysing a case.⁴⁴⁷

Second, the starting point of a project of ‘interdisciplinarity as translation’ should not be a theory or method but rather a shared substantive problem or puzzle. As Kratochwil notes, when “we ask ourselves why certain types of interdisciplinary investigation seem to have been successful, we notice that none of them was based on some form of disciplinary imperialism, be it methodological or substantive. Rather, these investigations started with a substantive problem that did not fit the standard disciplinary accounts”.⁴⁴⁸ For Kratochwil, the constructivist observation that the “human world is not simply given and/or natural but that, on the contrary the human world is one of artifice” could be one

⁴⁴⁶ I take the term ‘colonial semiosis’ from Mignolo. See, for example, Walter D. Mignolo, ‘Afterword: From Colonial Discourse to Colonial Semiosis’, *Dispositio* 14, no. 36/38 (1989): 333–37.

⁴⁴⁷ Gunther Teubner, ‘How the Law Thinks: Towards a Constructivist Epistemology of Law’, *Law & Society Review* 23, no. 5 (1989): 746–750 (emphasis added).

⁴⁴⁸ Kratochwil, ‘Constructivism as an Approach to Interdisciplinary Study’, 14.

starting point.⁴⁴⁹ Similarly, Nicholas Onuf argues that “constructivism can do the job of we think of it as a comprehensive framework of social theory and covering social relations of every sort”.⁴⁵⁰ This does not mean that we should create a new mode of subsumption. But rather the opposite is the case as constructivism understood in this way is a reconstructive logic of inquiry. Applied to the relationship of IR and IL this would shift our focus to the world making capacities of legal language.

Finally, this goes also hand in hand with James Boyd Whites suggestion that the notion of translation helps us to leave both the ‘culture of dynamism’ (as we have found it in many streams of IR theorizing) and the ‘culture of formalism’ (Koskeniemi’s romanticism) behind and that we should instead focus on a “culture of argument” when it comes to collective investigations of legal scholars with other disciplines.⁴⁵¹ As Wight explains one should think of law as a

“culture – as a ‘culture of argument’ – or, what is much the same thing, as a language, as a set of ways of making sense of things and acting in the world. So regarded, it is far more complex than the ‘law as rules’ (or ‘law as rules plus principles’) theory can begin to allow and far more substantial in its effects, actual and potential, than the ‘law as facade’ theory would have it. The law is a set of ways of thinking and talking, which means, as Wittgenstein would tell us, a set of ways of acting in the world (and with each other) that has its own configurations and qualities, its own consequences. Its life is a life or art. This is, after all, how we learn law, not as a set of rules nor as the art of unmasking [...] but by participation in a culture, learning its language and how to live within it; and this is how we practice law, too”.⁴⁵²

As I will suggest in the next chapter, both critical international legal scholars such as Kennedy and Koskeniemi as well as radical constructivists such as Kratochwil

⁴⁴⁹ Kratochwil, 17.

⁴⁵⁰ Onuf, ‘The Politics of Constructivism’, 239.

⁴⁵¹ White, *Justice as Translation*. Yet, White speaks instead of a ‘culture of dynamism’ of a ‘culture of instrumentalism’. Nevertheless, White’s use of a ‘culture of instrumentalism’ resembles Koskeniemi’s use of a ‘culture of dynamism’.

⁴⁵² White, xiii.

and Onuf can be read with all their differences as treating law as a ‘culture of argument’: this is the case in particular in their earlier publications as they attempted to reconstruct here how international legal argumentation works as well as in their more recent investigations where they focus, among other topics, on the world making capacities and politics of international legal experts and expertise. The focus on the politics of expertise might then also open up for a re-description of the ‘international’ in terms of ‘world society’.⁴⁵³

6. Conclusion: Jurisdiction and the Politics of Interdisciplinarity

The purpose of this chapter was to reconstruct interdisciplinary projects between IR and IL as jurisdictional struggles between disciplines and fields of knowledge. Instead of fixing the concept of interdisciplinarity *a priori* and providing a stipulative definition of what interdisciplinarity is and/or should be – something that would encompass a logic of subsumption –, I suggested that a *reconstruction of the grammar of interdisciplinarity projects* might be more promising if we want to understand the dynamics and politics of interdisciplinarity – and the sometimes problematic relationship between the ‘sibling’ disciplines of IR and IL. Furthermore, by relying on this methodological approach I was able to demonstrate that different interdisciplinary projects between IR and IL come with different images of (international) law, are embedded in different conceptualisations of how the ‘international’ is structured, foreground different ‘heroic figures’, connect law and politics in different ways and support different visions of interdisciplinarity (as disciplinary linking) itself.

Rather than providing a reconstruction of every interdisciplinary project that occurred in the context of IR and IL, I focussed on a number of, in my view, important and emblematic moments and points of crystallisation of interdisciplinarity between both disciplines – sometimes uttered explicitly, sometimes conducted implicitly. As first project, I discussed a number of attempts

⁴⁵³ Kessler, ‘World Society’, 107. This resembles also Kratochwil’s suggestion that ‘sociology could perhaps provide a “neutral” meeting place for the interdisciplinary dialogue’, Kratochwil, ‘International Law and International Sociology’, 314. For a similar point, i.e. to start interdisciplinarity from the idea that law is a certain form of argumentation (or practice), see Aalberts and Venzke, ‘Moving Beyond Interdisciplinary Turf Wars’.

by the University-of-Chicago-based scholars Frederick Schumann, Harold Lasswell and Quincy Wright during the *Interbellum* and how they tried to link IL and the (emerging) field of IR by invoking an external 'third', namely 'social sciences' or a 'New policy science'. This external third should then provide the point of orientation for more scientific endeavours within both disciplines. Moreover, the international was theorized in terms of 'international organization' where international law was seen as an important technical device to eliminate war. The heroic figure of this project was consequently the social and legal engineer working in and around the international institutions of Geneva.

The second project revealed the (hidden) interdisciplinary dialogue, which started in the 1940s, between political realism in IR and legal positivism in IL. We can speak of an interdisciplinary dialogue as both streams were situated in the 'blind spot' of the other: where IR's realism began increasingly – mostly in order to create its own disciplinary turf – to eliminate its ties to the discipline of IL and topics related to international law (for example, by mobilising against 'legalism'), the legal positivism IL, on the other hand, started to eliminate political considerations from the sphere of law in order to gain some 'relative autonomy'. Yet, despite all their differences, these attempts share a common image of international law where international law is rather formalistic ('law as rules') and where international law is the outcome or epiphenomenon of politics – the struggle for power. This project remained – with regard of picturing the 'international' – within the broader image of 'international organization'. However, 'international organization' is portrayed differently: it is not the 'international organization' of the interwar 'move to (formal) institutions' and its hope in the universal rationality of mankind (by means of education) but it is now the idea to rely on the institution of the balance of power and the prudence of those being in charge. As a consequence (at least for IR), the 'heroic figure' became the prudent statesman, the diplomat or the foreign policy officer of the great powers.

As a third project I turned to the recent wave of interdisciplinary scholarship – scholarship that explicitly uses the term 'interdisciplinary' – between mainstream scholars from IR and IL. Here, I focussed, on the one hand, on the liberal institutionalist 'IL/IR' research that emerged in the regimes debate and had

its peak in the literatures on the 'legalization of world politics' and the 'legitimacy of global governance institutions' as well as, on the other hand, on the moderate constructivist work on the 'power of human rights' and attempts to identify 'legitimacy' as a distinctive, almost law-like, rationale of action. Although these mainstream projects claim to practice interdisciplinarity among equal partners, a second view revealed that these projects also carry a 'hegemonic' dimension. Furthermore, these projects foster a rather mechanistic logic of interdisciplinarity – as if it is possible to directly transfer or transplant the theory or findings from one discipline to another; interestingly, this mechanical understanding of interdisciplinarity is accompanied by a rather mechanistic logic of law (as well as norms and language) where rates of 'compliance' reveal whether something is legal or not. In this context the conceptualisation of the 'international' shifted from 'international organization' to 'global governance'. Although global governance scholars still recognize that the international is anarchic and mainly composed of states, the emergence of regimes and the diagnosis that legitimacy and law might matter, makes the international 'tameable' and introduces new actors and logics of 'governing beyond the state'. Here, our attention is directed to the role of 'transnational advocacy networks', processes of 'cross-fertilization' between international and domestic courts, the power and authority of private actors such as multinational enterprises and rating agencies or the vast number of minor and major formal international organisations. As a consequence, the 'heroic figures' of this strand of research are, for example, the human rights activist, the judge or the bureaucrat in international organizations.

Fourth, I reconstructed the way how critical legal scholars and radical constructivists challenge this recent wave of interdisciplinary 'mainstream' scholarship. While critical legal scholars pointed to the hierarchies, power relations, silences and blind spots of these projects by highlighting moments of 'colonization', 'conquer' and 'instrumentalisation', radical constructivists mainly stressed the methodological, epistemological and ontological shortcomings of the 'mainstream', e.g., how it treats 'regimes', 'legalization' or 'norms'. Yet, this focus on 'mainstream' projects of interdisciplinarity produced its own blind spots and created by introducing, for example, a 'culture of formalism' new forms of 'hyper-disciplinarity' reifying even more existing disciplinary boundaries. In order to

crack these boundaries open, I suggested towards the end of the chapter that treating 'interdisciplinarity as translation' might be a promising avenue in order to start common research among more critical scholars in both disciplines and to engage in more reflexive forms of interdisciplinarity. As a caveat: as promising treating interdisciplinarity as translation is, it will not provide us with a tool to solve paradoxes, to eliminate power relations and to shed light into blind spots but it will enhance our vocabulary to make paradoxes, power relations and blind spots visible, analysable and criticisable; moreover, it points to the necessity to begin common investigations not by starting with a certain theory or method but rather by reconstructing a substantive puzzle or problem. In line with this, the next chapter reconstructs how critical scholars from both disciplines started in the 1980s to problematize the 'presumption of anarchy' – the foundation of images of the 'international' at that time – and how they turned to the 'indeterminacy of international law' by mobilizing different strands of the linguistic turn. I move then, towards the end of that chapter, to different avenues of advancing from the focus on the linguistic turn(s) to the social and historical precondition of (international) legal argumentation.

Figure 1 attempts to summarize by means of perspicuous representation the points I have made so far with regard to interdisciplinarity. As such it provides a map of the structure of the interdisciplinary argument between IR and IL.⁴⁵⁴

Project	Interdisciplinary Move	Law/Politics Nexus	Hero Figure	Context
Interwar Chicago	The 'third' of policy and social science	Law trumps politics/ law as engineering	Legal Engineer	International Organization
Legal realism/ legal positivism	'Strange symbiosis', constitutive other	Politics structures law	Diplomat	International Organization
Neoliberal Institutionalism (regimes, legalization), soft constructivism	Colonization	Law trumps politics, focus on compliance	Norm entrepreneur	Global Governance
Radical constructivism/ Critical International Legal Studies	translation	Law and politics intertwined, focus on law as argumentation	International legal expert	Global Governmentality, International Legal Field, World Society

Figure 1. The structure of the interdisciplinary argument between IR and IL

⁴⁵⁴ This kind of mapping is, of course, mainly influenced by David Kennedy. See in particular the map in Kennedy, 'Tom Franck and the Manhattan School', 402.

Chapter 3: Constructivism, Critical Legal Studies and the Changing Contours of the Politics of International Law

*“Constructivism without international law is really unthinkable”*⁴⁵⁵

1. Introduction

More than three decades ago, in its spring volume of 1985, the *Harvard International Law Journal* published an article on the relationship of legal theory and ordinary language philosophy (the latter understood mainly as speech-act theory).⁴⁵⁶ The piece was written by Nicholas Onuf and had the rather long title ‘Do Rules Say What They Do? From Ordinary Language to International Law’. It was since then republished twice: as a key chapter (‘Law and Language’) in Onuf’s ground-breaking 1989-monograph *World of Our Making* and (sticking to its original title) in a collection of essays on *International Legal Theory*, which was published in 2006.⁴⁵⁷ I will come back, in more detail, to the content of the article later in this chapter. However, to look at the career of Onuf’s article is already interesting as it reveals at least three things. First, it shows how intimate the connection of constructivism and international law is. As it is widely known, Onuf introduced in *World of Our Making* the term ‘constructivism’ to the field of IR. However, it is less known that Onuf devoted most of his research in the first twenty years of his career to international legal theory.⁴⁵⁸ Second, although the paper remained in length, form, structure and content in principle without alteration, Onuf kept changing the headings of the section. While, for instance, in 1985 the first section had the title ‘The Positivist Legal Tradition and International Law’, it was named ‘Positivism’ in 1989 and ‘Legal Positivism’ in 2006; the second section changed over time from ‘The Success and Failures of the Contemporary

⁴⁵⁵ Jan Klabbers, ‘The Bridge Crack’d: A Critical Look at Interdisciplinary Relations’, *International Relations* 23, no. 1 (2009): 121.

⁴⁵⁶ Nicholas Onuf, ‘Do Rules Say What They Do? From Ordinary Language to International Law’, *Harvard International Law Journal* 26, no. 2 (1985): 385–410 (the volume included also contributions by Günter Frankenberg, David Kennedy, James Boyle - and Kenneth Abbott - all intending to pursue new path in international legal theory).

⁴⁵⁷ Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989), chap. 2; Nicholas Onuf, *International Legal Theory: Essays and Engagements, 1966-2006* (New York: Routledge-Cavendish, 2008), chap. 14.

⁴⁵⁸ Onuf, *International Legal Theory*, xvi–xxiii.

Critique of Positivism' (1985) to 'The Limits of Legal Theory' to 'Indeterminacy' (2006); and so on.⁴⁵⁹ In particular, the changes in the second section (which remained in length and content nearly unchanged) are telling as they reveal the shifting fashions of 'critical' scholars: from the critique of positivism to the project of indeterminacy. This brings me to the third point. Onuf does not only introduce a critique of the legal positivist mainstream in international legal theory but also introduces and connects the critique with the work of two authors: David Kennedy and Friedrich Kratochwil. As Onuf puts it in *World of Our Making*, both share a "postpositivist" position and "challenge positivist premises, as I [Nicholas Onuf] do here".⁴⁶⁰ And, if Onuf would have published the piece only a couple of years later he would certainly have included Martti Koskenniemi as another key figure in the 'postpositivist' movement.⁴⁶¹

All of these authors – Onuf, Kratochwil, Kennedy and Koskenniemi – have in common that they attempted from early onwards to transform their respective disciplines in a rather self-conscious and ambitious way. We can see this already in the opening sentences of three, now seminal, monographs of this generation of scholarship, namely Onuf's *World of Our Making*, Kratochwil's *Rules, Norms, and Decisions* and Koskenniemi's *From Apology to Utopia*. All three books were published in 1989 (and some may say that these books were hardly read; never engaged with; yet often cited).⁴⁶² For instance, Onuf writes in the very first paragraph of *World of Our Making*:

⁴⁵⁹ The remainder of the paper is structured into one ('Performative Language', 1989), two ('Social Rules' and 'Speech acts, rules, and international law', 2006) and three ('From Philosophy of Language to Rules', 'Establishing a Speech Act Basis for Rules' and 'Speech Acts, Rules, and International Law') sections. However, this is only on the first view a substantive change as a second view reveals that the text of the different versions is nearly identical.

⁴⁶⁰ Onuf, *World of Our Making*, 76. However, it remains unclear whether he refers to 'philosophical', 'scientific' or 'legal' positivism – or all together.

⁴⁶¹ See, for example, Onuf's early review essay of *From Apology to Utopia* where he lists inter alia Kennedy, Kratochwil and Koskenniemi as representatives of the 'postpositivist' movement, Nicholas Onuf, 'Review: From Apology to Utopia: The Structure of International Legal Argument. By Martti Koskenniemi', *American Journal of International Law* 84, no. 3 (1990): 771; see also Nicholas Onuf, 'The Constitution of International Society', *European Journal of International Law* 5, no. 1 (1994): n. 5 and 10. For another early attempt to bring critical IL scholars (among others Kennedy and Koskenniemi) and radical IR constructivists (Kratochwil) together, see Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law', *European Journal of International Law* 2, no. 1 (1991): 66–96.

⁴⁶² In my discussion below I will demonstrate that Kennedy shares the same commitment and similar tools to renew his discipline as Onuf, Kratochwil and Koskenniemi do. Yet in contrast to Onuf, Kratochwil and Koskenniemi, Kennedy had published his first ground-breaking book already

“The point of this book is to reconstruct a self-consciously organised field of study, or discipline, called International Relations. To do so necessarily involves reconsideration of international relations as something to study. I use the term ‘reconstruct’ deliberately, both because my goal is ambitious and because I am committed to a philosophical position [...], which I call ‘constructivism’”.⁴⁶³

Kratochwil pursues a similar avenue and defines the scope and aim of *Rules, Norms, and Decisions* in a highly ambitious way:

“This book examines the role of norms in international life. To the extent that the focus is on interactions in the international arena, it is a book about international relations. To the extent that the investigation is interested in legal norms it is a book on legal theory. Insofar as issues of ‘interpretations,’ ‘precedent,’ and ‘sources of law’ will be discussed, it is in a way a treatise on jurisprudence. To the extent that rules and norms are viewed as means to maintain social order it is a book on social theory. Finally, to the extent that the analysis is occasioned by the re-reading of some of the classics of international law and political theory, it is – at least indirectly and without wanting to claim comprehensiveness or completeness – a study of political thought”.⁴⁶⁴

And, finally, Koskenniemi exposes his endeavour at the beginning of his treatise *From Apology to Utopia* as follows:

“This is not only a book in international law. It is also an exercise in social theory and in political philosophy. [...] This does not mean that lawyers should become social theorists or political visionaries. But it does mean that without a better grasp of social theory and political

two years earlier, in 1987, David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987).

⁴⁶³ Onuf, *World of Our Making*, 1.

⁴⁶⁴ Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989), 1.

principles lawyers will continue to be trapped in the prison-house of irrelevance. They will continue to have one foot in crude pragmatism and the other in indeterminate theorizing without understanding the relations between the two and why taking a position in either will immediately seem vulnerable to apparent justifiable criticisms”.⁴⁶⁵

These opening statements are not just, as I already noted, ambitious and self-conscious. These opening statements identify also the need to incorporate the knowledge of other academic disciplines. In other words, all three authors (and the same holds true for Kennedy) point to the advantages of interdisciplinary research as it could help to escape the narrow confines of their own fields of study. In addition, they understand the need to cross disciplines in a similar way as all refer to the same set of disciplines from which they seek inspiration. These sources of inspiration are the various forms and repercussions of the linguistic turn in philosophy and social and political theory, namely its analytical as well as its hermeneutical version.⁴⁶⁶ This genuine interdisciplinary perspective was however never translated into larger common research projects between radical constructivists in IR and critical approaches in IL.⁴⁶⁷ As we have seen in the previous chapter both camps were mainly occupied with criticising the mainstream of their ‘own’ disciplines – and if they engaged with the ‘other’ discipline they turned again towards a critique of the mainstream of that discipline – a constellation that resulted sometimes even in calls for ‘counterdisciplinarity’.

The purpose of this chapter is to continue what I started in the last section of the previous chapter, i.e. to discuss the promises and possibilities but also the problems and perils of research on the ‘politics of international law’ that draws on both radical constructivism and critical international legal scholarship. In order to do so, the next two sections (2. and 3.) reconstruct roughly a number of key aspects of the *projects* of Onuf, Kratochwil, Kennedy and Koskenniemi. I will mainly

⁴⁶⁵ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005), 1, 4.

⁴⁶⁶ On the origins and different versions of the linguistic turn, see, for example, Jürgen Habermas, ‘Hermeneutic and Analytic Philosophy. Two Complementary Versions of the Linguistic Turn?’, *Royal Institute of Philosophy Supplement* 44 (1999): 413–41.

⁴⁶⁷ For an exception see Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen, eds., *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016).

focus on their earlier writings and, in the case of Onuf and Kratochwil, on their legal writings. Moreover, and this is the core argument of this chapter, I will show that all four scholars took the ‘linguistic turn’, but they did so in different ways. This will help me to outline the basic characteristics and structure of critical work in both disciplines. However, I neither want to remain in 1985 nor in 1989 nor in 2006 – the years of the (re)publication of Onuf’s essay. In order to move on, I will discuss in the conclusion of this chapter (4.) how different ways the ‘linguistic turn’ was taken opens up different social theoretical avenues to study the ‘politics of international law’. The aim of this chapter is thus not to elaborate a ‘joint discipline’ but rather, by highlighting similarities and differences, to develop a vocabulary that draws on different sources and is able to grasp recent developments of the ‘politics of international law’ and thereby prepare the discussion of the next chapter, which will be on the ‘politics of expertise’ in international law.

2. Radical Constructivism and International Law

In my discussion of mainstream accounts of IR and global governance in the previous chapter, I introduced efforts of moderate constructivists to engage with international law and highlighted how these efforts are connected to various projects of IL scholarship. I turn now to the second camp of constructivism, namely its more radical version, and reconstruct how this type of constructivist research studies international law. The more radical version of constructivism is mainly represented by its ‘first generation’. Onuf and Kratochwil certainly stand out as main representatives of this generation. Only later, during the 1990s, constructivism developed its more moderate version (also known as ‘second generation constructivism’) – under the heavy pressure to become ‘scientific’ in a way the rationalist mainstream had defined it.⁴⁶⁸ In a nutshell, as outlined above moderate constructivism is, when it comes to international law, mainly interested in the study of norms and, here, in the question of compliance with norms (i.e.,

⁴⁶⁸ On the ‘generations’ of constructivism and the promise of a ‘third generation’ taking up a similar postpositivist stance as the ‘first generation’ see the recent forum introduced by Oliver Kessler and Brent J. Steele, ‘Introduction: “Constructing IR: The Third Generation”’, *European Review of International Studies* 3, no. 3 (2016): 7–13.

norm diffusion, logics of actions, etc.). Yet, on the other hand, the more radical version argues that norms are counterfactually valid and – as a consequence – enterprises to measure the validity of norms by focussing on rates of compliance are about to fail. Instead, radical constructivists are concerned with the question of how law is used and how behaviour is justified through legal and law-like argumentation.⁴⁶⁹ In order to show what this exactly means I will reconstruct in the next two sub-sections the role of law in the work of constructivist's 'founding fathers' and still prevailing representatives of the more radical version of constructivism, Onuf and Kratochwil.⁴⁷⁰

2.1 Onuf

We have already seen in the opening sentences of *World of Our Making*, which I quoted at the outset of this chapter, that Onuf connects his project of reconstructing IR with the analytical stance of constructivism. For Onuf, constructivism is the appropriate take for this endeavour as it offers, firstly, a vocabulary to challenge (disciplinary) foundations because for constructivism “the ground itself is the rubble of construction”.⁴⁷¹ Yet, for Onuf this does not mean that constructivism does not claim that it presents an approach without foundations but it delivers a way to debunk foundations and reflect upon its own foundations. Secondly, constructivism is not restricted to IR and the study of its subject matter international relations as it “applies to all fields of social inquiry”.⁴⁷² For Onuf constructivism is, in other words, “a way of studying social relations—any kind of

⁴⁶⁹ Filipe dos Reis and Oliver Kessler, ‘Constructivism and the Politics of International Law’, in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 345–346. More generally, the moderate and radical version of constructivism are usually delimited by the question of whether they take the linguistic turn or not. While moderate constructivists stick to the idea that language objectively represents an accessible ‘world out there’, moderate constructivists believe that language is part of the social construction of our world and that our world is always accessed from somewhere, see Nicholas Onuf, ‘The Politics of Constructivism’, in *Constructing International Relations: The next Generation*, ed. Karin M. Fierke and Knud Erik Jørgensen (Armonk: M.E. Sharpe, 2001), 246. See also Maja Zehfuss, *Constructivism in International Relations: The Politics of Reality* (Cambridge: Cambridge University Press, 2002).

⁴⁷⁰ Together with Oliver Kessler, I have done so in a slightly different way in dos Reis and Kessler, ‘Constructivism and the Politics of International Law’, 354–359; see also Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge: Cambridge University Press, 2010), chap. 1.

⁴⁷¹ Onuf, *World of Our Making*, 35.

⁴⁷² Nicholas Onuf, ‘Constructivism: A User’s Manual’, in *International Relations in a Constructed World*, ed. Vendulka Kubáľková, Nicholas Onuf, and Paul Kowert (Armonk: M.E. Sharpe, 1998), 58.

social relations”.⁴⁷³ However, it is “not a theory as such” as it “does not offer general explanations for what people do, why societies differ, how the world changes”.⁴⁷⁴ As constructivism is, in other words, not a first-order theory, it can be conceived as a meta-theory, which “makes it feasible to theorize about matters that seem to be unrelated because the concepts and propositions normally used to talk about such matters are also unrelated”.⁴⁷⁵ As such, constructivism can be combined with a variety of substantive (i.e., first-order) theories. While Onuf admits that his own substantive position can be located in the tradition of a Kantian version of republicanism or, more recently, in Aristotelian virtue ethics, other constructivists labelled themselves, for instance, as ‘realist constructivists’.⁴⁷⁶

To conduct the study of international relations as the study of social relations has far-reaching consequences as it directly challenges the ‘identity’ of IR – at least the ‘identity’ back in the times when constructivism emerged. It challenges the ‘identity’ of IR as it shows, according to Onuf, that international relations are composed of a plethora of rules. And if there

“are rules—many rules, constituting and regulating the relations of states—then there must be a condition of rule. Or, to say the same thing, there can be no anarchy. To say this is to challenge IR’s very identity as the study of the dark side of politics”.⁴⁷⁷

⁴⁷³ Onuf, 58.

⁴⁷⁴ Onuf, 58.

⁴⁷⁵ Onuf, 58; The reason why Onuf elaborates constructivism in the context of IR, is for him a practical one as ‘international relations are the subject of this book only because I have thought more about them’, Onuf, *World of Our Making*, 27.

⁴⁷⁶ On Onuf’s ‘Kantian sympathies’, see Onuf, ‘The Constitution of International Society’, 2; and on his ‘republicanism’, see Nicholas Onuf, *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998); and on Aristotelian virtue ethics, see Nicholas Onuf, ‘Thinking About Ethics, Thinking Across Fields’, *E-International Relations* (blog), 22 June 2016. For an example of ‘realist constructivism’ see: J. Samuel Barkin, ‘Realist Constructivism’, *International Studies Review* 5, no. 3 (2003): 325–42. Conceptualising constructivism as a meta-theory which can be linked to different more substantive theories has, of course, the consequence that the popular structure of literature reviews, which haunted so many journal articles and book reviews over the years, by introducing three IR theories (realism, liberalism, constructivism) turns into a category mistake. To avoid this, constructivism should rather be contrasted with, e.g., scientific positivism or critical realism.

⁴⁷⁷ Nicholas Onuf, ‘Rule and Rules in International Relations’ (talk presented at the Erik Castrén Institute of International Law and Human Rights University of Helsinki, 24 April 2014).

Constructivism is, thus, a way of getting rid of IR's foundation and its constituting puzzle, namely the 'presumption of anarchy':⁴⁷⁸ "The incidence of anarchy is not the same as a condition of anarchy, that is, an absence of rule".⁴⁷⁹ There might be no *rule*, but there are still *rules*. To get rid of the image of the 'international' as an anarchical condition without rules means also to get rid of the sharp boundary between the 'domestic' and the 'international' – and the subsequent idea that both international and domestic politics constitute distinct modes of politics (on the one hand, the state of nature; and, on the other hand, the state) with only loosely linked disciplines (on the one hand, Political Science; and, on the other hand, International Relations).⁴⁸⁰

As we have seen, Onuf attempts to crack open the 'anarchy presumption' by introducing and theorizing the concept of rules. *Indeed, rules are the heart of Onuf's version of constructivism. And rules are also the connection to international legal theory.*⁴⁸¹ The centrality of rules in Onuf's work becomes tangible when we take the following paragraph into account:

"Constructivism holds that people make society, and society makes people. That is a continuous, two-way process. In order to study it, we must start in the middle, so to speak, because people and society, always having made each other are already there and just about to change. To make a virtue of necessity, we will start in the middle,

⁴⁷⁸ On the 'presumption of anarchy', see Onuf, *World of Our Making*, chap. 5; to contest anarchy as constitutive idea of international politics and thus as foundation for a distinct form of politics was the common theme of the early post-positivist movement in IR. In particular and among many others see Richard K. Ashley, 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique', *Millennium* 17, no. 2 (1988): 227–62.

⁴⁷⁹ Onuf, *World of Our Making*, 167.

⁴⁸⁰ 'Current scholarship tends to view domestic societies as having progressively solved the problem of order by developing states, while international relations persists in anarchy. I take a contrary view, namely, that international relations was never a matter of anarchy, any more than domestic societies could have been', Onuf, 164; The most powerful assessment of the domestic/international distinction is until now: R. B. J. Walker, *Inside/outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993).

⁴⁸¹ It is interesting to see that almost simultaneously, though independently, Thomas Franck developed his account of legitimacy in IL, which focuses exclusively on the rules and rule-based institutions of international law. Franck's main concern was to uncover whether the rules of international law are obeyed because they are perceived as legitimate. This connects, of course, also to the moderate constructivist literature on legitimacy. See Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990). See also my discussion in Chapter 2.

between people and society, by introducing a third element, *rules*, that always links the other two elements together. Social rules (the term *rules* includes, but is not restricted to, legal rules) make the process by which people and society constitute each other continuous and reciprocal”.⁴⁸²

This statement has important implications. As we have read, Onuf uses rules to connect people (as agents⁴⁸³) with society (existing of institutions⁴⁸⁴ and structure⁴⁸⁵). Onuf defines rules as “statements that tell people *what we should do*”.⁴⁸⁶ And, it was in the 1985-article, with which I started this chapter, where Onuf elaborated for the first time – and through an in-depth assessment of positivist (international) legal theory – his framework of rules. Although rules are a fundamental concept for legal positivists, the positivists’ treatment of rules is, according to Onuf, problematic as legal rules and legal order are linked to compliance where we are then confronted with the problem of circularity: that rules work make them legal – that rules are legal make them work – and so on. Another problem arises through the close connection of legal positivism and scientific positivism since the epistemic presupposition of scientific positivism pre-selects what can be observed as law.⁴⁸⁷ What counts as fact determines the outcome, meaning that legal rules, which are not obeyed, and rules, which are obeyed but not traced to any legal authority, are out of sight (most legal theorists ignore this problem, although it is in international law particularly relevant as international law has no ‘hard core’ of law).⁴⁸⁸ In order to overcome the “failure of scientific positivism to provide itself with an adequate philosophical grounding”,

⁴⁸² Onuf, ‘Constructivism: A Users Manual’, 59.

⁴⁸³ ‘People are agents, but only to the extension that society, though its rules, makes it possible for us to participate in the many situations for which there are rules. [...] Agency is a social condition’, Onuf, 59–60.

⁴⁸⁴ ‘Whether by accident or design, rules and related practices frequently form a stable (but never fixed) pattern suiting agents’ intentions. These patterns are *institutions*’, Onuf, 61 (emphasis in the original).

⁴⁸⁵ ‘Any stable pattern of rules, institutions and unintended consequences gives society a *structure*, recognizable as such to any observer [...]. Agents are always observers’, Onuf, 61 (emphasis in the original).

⁴⁸⁶ Onuf, 59 (emphases in the original).

⁴⁸⁷ As a side note, this does not mean that legal positivism and scientific positivism are always linked as, for instance, H.L.A. Hart combined a postpositivist view on science, deeply rooted in ordinary language philosophy (in particular, the late Wittgenstein), with legal positivism. For further discussion see Horst Eckmann, *Rechtspositivismus und sprachanalytische Philosophie: Der Begriff des Rechts in der Rechtstheorie H.L.A. Harts* (Berlin: Duncker & Humblot, 1969), chap. 3.

⁴⁸⁸ Onuf, ‘Do Rules Say What They Do?’, 386.

Onuf introduces ordinary language philosophy in order to get a better grounding.⁴⁸⁹ However, it is less the late Ludwig Wittgenstein's version of ordinary language philosophy, which is mobilised by Onuf as it is rather speech-act theory in the tradition of John Langshaw Austin and, first and foremost, the reconstruction of Austin's work by John Searle.⁴⁹⁰ As Onuf makes clear:

"Austin was the first to recognize the performative aspect of language for what it is. He and other Philosophers working in the ordinary language tradition were attracted to particular cases and not the general features of language use. Only with John Searle did consideration of speech acts locate itself in a codificatory paradigm. Searle's starting point is both familiar and, for our purpose, appropriate. 'Speaking a language is engaging in a (highly complex) rule-governed form of behavior'. Searle brought speech acts to the door of social theory".⁴⁹¹

Onuf follows Searle so far as he adopts Searle's 'categorization' or 'typology' (Onuf uses both terms in a generic way) of speech acts and, in a second step, directly links it to legal practices and, more importantly, to different types of rules.⁴⁹² This categorization (and categories are understood in this context as Wittgensteinian "family resemblances"⁴⁹³) of rules is, in Onuf's words: "universal".⁴⁹⁴

According to Onuf there are three categories of rules as "all rules are *either* assertives [...] or directives [...] or commissives. [...]. In other words, with assertives, commissives, and directives, we have an inclusive typology of all rules".⁴⁹⁵ Onuf operates with a number of "threes".⁴⁹⁶ He distinguishes three

⁴⁸⁹ Onuf, 390.

⁴⁹⁰ For a discussion of the relevance but also the limits of Wittgenstein, see Onuf, *World of Our Making*, 43–51.

⁴⁹¹ Onuf, 82 (references and footnotes omitted).

⁴⁹² For Searle's typology of speech-acts see, in particular, John R. Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge: Cambridge University Press, 1979).

⁴⁹³ Onuf, 'Constructivism: A Users Manual', 70.

⁴⁹⁴ Onuf, *World of Our Making*, 97–98.

⁴⁹⁵ Onuf, 'Do Rules Say What They Do?', 401–402 (emphasis in the original). According to Searle, there are five types of speech acts, which are assertives (also known as constatives), directives, commissives, expressives and declarations. However, expressives and declarations are no rule candidates for Onuf. Expressives transmit a speaker's attitude and emotions. They are no rule

different types of speech-acts. First, assertive (or constative) speech acts state a belief, coupled to the wish or intention of a speaker that the hearer accepts this belief. Assertives are typically connected to verbs such as to ‘state’, ‘report’, ‘characterize’, ‘affirm’, ‘insist’, ‘attribute’ or ‘dissent’. Assertive speech acts are translated into the practice of instruction-rules. In the context of directives, the second category of speech acts, the hearer is confronted with a speaker’s intention to act in a way which the speaker would like to have performed. Typical verbs for directives are to ‘ask’, ‘demand’, ‘command’, ‘permit’, forbid or ‘caution’. This type of speech acts is visible in directive-rules. And finally, commissives reveal the speaker’s intention of being committed to a standard course of action. Here, to ‘offer’ or ‘promise’ are the most typical verbs. Commitment-rules (also called conferrals) are the relevant rule type in this context.⁴⁹⁷Or, “[s]tated differently, all rules are either assertives of the form, I state that X counts as Y, or directives of the form, I state that X person (should, must, may) do Y, or commissives of the form, I state that I (can, will, should) do Y”.⁴⁹⁸

Onuf applies this tripartite categorisation of rules and speech acts to other areas as he also identifies three types social activity, three types of rule and three types of law (Figure 2).

Rules	Instruction-Rules	Directive-Rules	Commitment-Rules
Speech-Acts	Assertives	Directives	Commissives
Social Activities	Naming and Relating	Enabling and Making Unable	Having and Using
Rule	Hegemony	Hierarchy	Heteronomy
Law	Principles	Formal Law	Regulation

Figure 2. Nicholas Onuf’s Typology of ‘Threes’

candidate as they are only related to the speaker and are over when acknowledged by the hearer. Declarations, on the other hand, do not even need the acceptance of a hearer in order to be completed.

⁴⁹⁶ On Onuf’s complex system of ‘threes’ see also the illustrative synoptic table at the end of Onuf, *World of Our Making*, 290–293.

⁴⁹⁷ Onuf, ‘Do Rules Say What They Do?’, 400.

⁴⁹⁸ Onuf, *World of Our Making*, 90.

While instruction-rules convey the *social activity* of naming and relating, directive-rules enable activities or make them unable and, finally, commitment-rules are linked to the practices of having and using.⁴⁹⁹ When we turn to the three different forms of *rule* this works in a similar way. For Onuf rules and rule are intertwined, as rules produce rule and rule produces rules: “By constituting condition of rule. Rules always distribute privilege, and always preferentially”.⁵⁰⁰ If instruction-rules are dominant in a particular setting the form of rule is hegemony, in the case of directive-rules it is hierarchy and commitment-rules constitute heteronomy. According to Onuf, in the specific setting context international relations heteronomy is the dominant mode of rule. This observation helps Onuf to overcome the assumption that the ‘international’ is dominated by anarchic rule.⁵⁰¹

When it comes to *law and legal theory* instruction rules play out as principles as they help us to rank and choose between a number of instructions; directives are what legal positivists usually call law as they are formally stated and subject to enforcement; and we can find commitment-rules in regulation as they help to routinize.⁵⁰² We can find all three types of law in the domestic as well as the international context. Consequently, the sharp distinction between international and the various forms of domestic law collapses. Where they differ, however, is the degree of institutionalization and formalization. As the international legal order is still less institutionalized and formalized as the domestic one, legal positivists (by focussing only on the directive-rule type of law) cannot grasp international law properly. In particular, they miss the role of regulation and principles as “law they are, whatever damage this does to the positivist conception of the proper legal order”.⁵⁰³ This brings Onuf to the conclusion “that the international legal order, although lacking a constitutional template for extrusion of legal rules, is very much a legal order”.⁵⁰⁴

⁴⁹⁹ Cf. Nicholas Onuf and V. Spike Peterson, ‘Human Rights from an International Regimes Perspective’, *Journal of International Affairs* 37, no. 2 (1984): 329–42.

⁵⁰⁰ Onuf, *World of Our Making*, 128.

⁵⁰¹ See Onuf, chap. 6.

⁵⁰² Somewhere else, Onuf (together with V. Spike Peterson) links ‘norms’ to instructions, ‘commands’ to directives as well as ‘rights’ and ‘duties’ to commissives: Onuf and Peterson, ‘Human Rights from an International Regimes Perspective’. However, Onuf does not follow this line later on.

⁵⁰³ Onuf, *World of Our Making*, 407.

⁵⁰⁴ Onuf, 410.

Yet, and this will be relevant in our discussion of international legal expertise, even if international legal positivists (and others) would be right that international law would not qualify as ‘proper law’, it would nevertheless matter. The reason for this can neither be found in law’s formal validity nor in rates of compliance but rather it is central to reconstruct the way lawyers structure international relations and to look hence at their capacity in world-making. As Onuf explains in a discussion of Lasswell’s theory of elites and their power in forming world opinion:

“That international law is not properly law by legal positivist criteria is no bar to the justificatory role of lawyers in world politics, because the point is to identify rules authorizing an organized activity [...] and to show that these rules are subject to enforcement. Recourse to such justifications, like diplomacy, is a peaceful means of – not alternative to – ‘attacking’”.⁵⁰⁵

This means that international lawyers shape world politics as they are getting, even without sanctioning mechanisms, what they want “by directing others to act in certain ways, explaining the consequences of their failures to do so, and justifying the measures that may be taken to effectuate such directives”.⁵⁰⁶ Consequently, lawyers and other international legal experts cannot be seen as a-political actors as they always translate political projects into the vernacular(s) of law. In the next chapter I will turn in more detail to the role and relevance of international legal expertise (and the international lawyers’ profession), but let us first have a look now at the work of Kratochwil – the other ‘founding father’ of constructivism in IR.

2.2 Kratochwil

As it was the case for Onuf, Friedrich Kratochwil’s points of departure are two puzzles directly connected to the ‘strange symbiosis’ between legal positivism and political realism. On the one hand, the legal positivist movement brings Kratochwil

⁵⁰⁵ Onuf, 252–253.

⁵⁰⁶ Onuf, 243.

to the question whether international law is ‘proper’ law and, on the other hand, political realism introduces the question whether the ‘international’ is in its structure really anarchical.⁵⁰⁷ Although Onuf and Kratochwil start with the same set of questions, have a strong background in international legal theory and are considered of being the two ‘founding fathers’ of constructivism in IR (and the main representatives of the more radical strand), both also differ to some extent in the way they conceptualise constructivism and approach (international) law – and this has, as I will argue towards the end of this chapter, much to do with how they take the linguistic turn.⁵⁰⁸ For instance, where Onuf starts with rules, Kratochwil “examines the role of norms in international life”.⁵⁰⁹ Although this may resemble, *prima facie*, the moderate constructivist obsession in studying the evolution, spread, diffusion and, particularly, compliance of and with norms – I have discussed this in the preceding chapter in the context of the ‘power of human rights’ – Kratochwil approaches this question in a different way. We have seen Kratochwil’s scepticism towards such a treatment of norms in the previous chapter already, when I introduced his radical constructivist critique on the international regimes and legalization literature. The upshot of this critique was the rejection of a conceptualisation of norms as explanatory variables. As we have seen, one central point was that, as Kratochwil emphasises, norms are counterfactually valid. Furthermore norms do not cause behaviour in a *causa efficiencie* understanding of causality. Norms rather guide behaviour and help to

⁵⁰⁷ ‘I suspect that it is our reliance on the unquestioned dichotomy between a “domestic order” and the “international anarchy” which is to blame for the continuing theoretical embarrassments. By making social order dependent upon law and law, in turn, upon the existence of certain institutions - be they the exercise of sovereign or central sanctioning mechanisms - we understand the international arena largely negatively, i.e., in terms of the “lack” of binding legal norms, of central institutions, of sovereign will, etc. As inappropriate the “domestic analogy” may be for understanding *international relations*, the conceptual link between order, law, and special institutions remain largely unexamined even for domestic affairs’, Kratochwil, *Rules, Norms, and Decisions*, 2 (emphasis in the original); see also Friedrich Kratochwil, ‘Is International Law “Proper” Law? The Concept of Law in the Light of the “Legal” Nature of Prescriptions in the International Arena’, *Archiv für Rechts- und Sozialphilosophie* 69, no. 1 (1983): 13–46.

⁵⁰⁸ Kratochwil has published extensively on international legal theory. Both of his monographs can be located at the intersection of international law and politics. See in particular Kratochwil, *Rules, Norms, and Decisions*, chap. 6, 7 + 8; and Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014). For an in-depth discussion of the latter monograph see also the recent forum introduced by Oliver Kessler, ‘Introduction to the Forum: The Status of Law in World Society’, *Millennium* 44, no. 2 (2016): 236–41.

⁵⁰⁹ Kratochwil, *Rules, Norms, and Decisions*, 1.

justify behaviour.⁵¹⁰ In this context “interdisciplinary works, when guided successfully”, can help to overcome IR’s “treatment of norms [which] suffers from a variety of epistemology shortcomings”.⁵¹¹ At first sight legal theory seems to be the ‘natural’ source of inspiration when it comes to conduct the of study norms. However, mainstream approaches in legal theory – from positivism to process and policy – share the same shortcomings as the prevailing IR approaches, namely they sharply distinguish between the domestic and the international and emphasise that we should focus primarily on compliance when we examine the role of norms.⁵¹²

To overcome these shortcomings Kratochwil developed over the years what he had labelled in 1986 (together with Ruggie) as ‘interpretative epistemology’ into his own take on (radical) constructivism.⁵¹³ Suffice is to say here that Kratochwil sees (similarly to Onuf) constructivism as a “meta-theory” and “neither a theory, nor even an approach to politics”. This does not mean, however, that as being a meta-theory constructivism is completely detached from substantive theories or from methods. Rather, methods, substantive theories and meta-theory are always linked and influence each other. They are linked by the core of constructivism, namely the assumption that “the things we perceive are rather the product of our conceptualisations”.⁵¹⁴ Yet, these conceptualisations are not the product of the minds of individuals but “social phenomena” and, thus, constructivists point out “that social phenomena such as money or authority are not natural kinds but utterly conventional”.⁵¹⁵ In order to examine ‘social phenomena’ – law being one of them – and conventions properly, we should turn to intersubjectivity.⁵¹⁶ And in order to study intersubjectivity we should turn to

⁵¹⁰ See again Friedrich Kratochwil and John Gerard Ruggie, ‘International Organization: A State of the Art on an Art of the State’, *International Organization* 40, no. 4 (1986): 767–768.

⁵¹¹ Kratochwil, *Rules, Norms, and Decisions*, 1.

⁵¹² Cf. Kratochwil, 2; and Friedrich Kratochwil, ‘How Do Norms Matter?’, in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 35–68.

⁵¹³ Kratochwil and Ruggie, ‘International Organization’, 772. For a comprehensive exposition of Kratochwil’s take on constructivism see Friedrich Kratochwil, ‘Constructivism: What It Is (not) and How It Matters’, in *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*, ed. Donatella Della Porta and Michael Keating (Cambridge: Cambridge University Press, 2008), 80–98.

⁵¹⁴ Kratochwil, ‘Constructivism’, 80–81.

⁵¹⁵ Kratochwil, 81.

⁵¹⁶ See the exposition of his ‘research program’ towards the end of Kratochwil, *Rules, Norms, and Decisions*, 256–262.

language and the different versions of the linguistic turn.⁵¹⁷ Here, Kratochwil's treatment of law is helpful to understand what this means.

As Kratochwil asserts at the outset of *Rules, Norms, and Decisions*, the "concept of law has become increasingly problematic".⁵¹⁸ He explains this later in the book when he states that

"attempts at defining a demarcation between legal and other norms is bound to fail because [sic!] it fundamentally misconstrues the problem of arriving at a decision through the utilization of rules and norms. Although judges are bound by the 'law' it can be shown that not all 'legal' rules are characterized by sanction, or form part of a deductive hierarchical system of norms. Consequently, legal rules and norms cannot be conceptualized as possessing one common characteristic, or by being treated merely as institutional rule".⁵¹⁹

Why is this so? A quick look at different "images of law" reveals that a purely referential model of language that tries to fix our concept of law by finding a stipulative – trans-historically and cross-culturally valid – definition of some *proprium* of law by introducing a demarcation criterion (or criteria), which clearly distinguishes between law and non-law, cannot be successful.⁵²⁰ Rather, 'law', as it is the case with all of our concepts, is – whatever one prefers – "indeterminate", "essentially contested" or has "blurred edges".⁵²¹ We have seen already the 'untameable' nature of concepts in our assessment of 'interdisciplinarity' in the preceding chapter. In order to leave the idea behind that concepts have one common characteristic, Kratochwil follows the later Wittgenstein and his notion of

⁵¹⁷ Cf. Sinclair, *International Relations Theory and International Law*, 19–21. While speech-act theory (as for Onuf) plays an important role in Kratochwil's account, it is however the late-Wittgenstein who had the strongest influence.

⁵¹⁸ Kratochwil, *Rules, Norms, and Decisions*, 2.

⁵¹⁹ Kratochwil, 186.

⁵²⁰ On different 'images of law' see Kratochwil, *The Status of Law in World Society*, 1–7.

⁵²¹ For an at-large discussion of (different forms of) indeterminacy see Kratochwil, 'How Do Norms Matter?', 43–51. The idea of 'essentially contested concepts' was developed by W. B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1956): 167–98; and was introduced to the study of politics by William E. Connolly, *The Terms of Political Discourse*, 3rd ed. (Oxford: Blackwell, 1994). The formulation 'blurred edges' is Wittgenstein's, Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (New York: Macmillan, 1953), para. 71.

‘family resemblances’. Wittgenstein illustrates the meaning of ‘family resemblance’ by introducing the notion ‘game’:

“Consider for example the proceeding that we call ‘games’: I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don’t say: ‘There *must* be something common, or they would not be called ‘games’”—but *look and see* whether there is anything common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don’t think, but look! [...] I can think of no better expression to characterize these similarities than ‘family resemblances’, for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.—And I shall say: ‘games’ form a family”.⁵²²

To follow the suggestion that the concept of law can better be understood in terms of ‘family resemblances’ – and these family resemblances being part of a larger ‘language game’ – means also that it becomes necessary to *reconstruct* the *use* of law in different contexts in order to understand its *meaning*.⁵²³ That there is no *proprium* or common category in order to determine what the law is does not mean, however, that the notion of law is completely arbitrary as it is still “possible to spell out some criteria that in *our society* are part of the language game of law”.⁵²⁴ When we start to follow this methodological route, we would start to understand ‘law’

“neither as a static system of norms nor as a set of rules which share some common characteristic such as sanctions; in the same vein as it is [...] mistaken to depict law simply as a process in which claims and counterclaims are made. Rather law is a choice-process characterized by the principled nature of *norm-use* in arriving at a decision through

⁵²² Wittgenstein, *Philosophical Investigations*, para. 66–67 (emphases in the original). Cf. Kratochwil, *The Status of Law in World Society*, 53–54.

⁵²³ The idea that meaning is use not reference, was of course famously stated by Wittgenstein: ‘the meaning of a word is its use in the language’, Wittgenstein, *Philosophical Investigations*, para. 43.

⁵²⁴ Kratochwil, *The Status of Law in World Society*, 65 (emphasis in the original).

reasoning. What the law *is* cannot therefore be decided by a quick look at statutes, treaties, or codes (although their importance is thereby not diminished), but can only be ascertained through the *performance* of rule-application to a controversy and the appraisal of reasons offered in defense of a decision”.⁵²⁵

Moreover, to reconstruct law as ‘norm-use’ or ‘performance of rule-application’ locates law within the realm of “*praxis* rather than ‘theory’”⁵²⁶ and encourages Kratochwil *to focus on legal argumentation as a specific form of practical reasoning*.⁵²⁷ This means that practical reasoning *per se* is not legal as, for instance, rights-based reasoning or reasoning about moral issues also constitute widespread forms of practical reasoning. Law is, thus, in other (more Luhmannian) words a “system of communication possessing a logic of its own”.⁵²⁸ As such, legal communication plays an important role in structuring our society as it gives participants information “about the nature of the game”, as Kratochwil writes, “by determining the type of actors who can make claims, it sets the range of permissible goals the actors can pursue, specifies the steps necessary to insure the validity of their acts and assigns priority and weight to different claims”.⁵²⁹

However, to examine what – in ‘our society’ (as a side note: Kratochwil never specifies what he means by this term)⁵³⁰ – makes practical reasoning legal, i.e. turns it into legal argumentation, requires a couple success conditions. These success conditions play a vital part in Kratochwil’s reconstruction of (international) law. While Kratochwil focused in *Rules, Norms and Decisions* primarily on classical rhetoric (particularly, in the Aristotelian tradition), he further extended his reconstruction of the ‘path of the legal argument’ since then. In *Rules, Norms and Decisions* Kratochwil carves out how law as a specific “‘style’ of

⁵²⁵ Kratochwil, *Rules, Norms, and Decisions*, 18 (emphasis in the original). The second part of the quote remained unchanged in Kratochwil, *The Status of Law in World Society*, 65–66.

⁵²⁶ Friedrich Kratochwil, ‘Legal Theory and International Law’, in *Routledge Handbook of International Law*, ed. David Armstrong (London: Routledge, 2009), 56.

⁵²⁷ Cf. Kratochwil, *The Status of Law in World Society*, 65.

⁵²⁸ Kratochwil, ‘Legal Theory and International Law’, 65; similarly, Friedrich Kratochwil, ‘Thrasymachos Revisited: On the Relevance of Norms and the Study of Law for International Relations’, *Journal of International Affairs* 37, no. 2 (1984): 350.

⁵²⁹ Kratochwil, ‘Thrasymachos Revisited’, 350.

⁵³⁰ See also the discussion of Kratochwil and the boundary of law, in Wouter Werner, ‘What’s Going On? Reflections on Kratochwil’s Concept of Law’, *Millennium* 44, no. 2 (2016): 258–68.

reasoning” works.⁵³¹ Three points are important here. *First*, Kratochwil distinguishes legal reasoning from other forms of practical reasoning, in particular, moral reasoning. As such legal reasoning works (a) less through principles (as it is the case of moral reasoning) but mainly through rules, which provide, for instance, strict deadlines for decisions. Legal arguments can rely (b) in different ways on intention (ranging from a narrow conception in criminal law in terms of *mens rea* to its neglect in cases of strict liability), while particularly in Kantian ethics intention is crucial. (c) Legal ‘truth’ and moral ‘truth’ can differ as it may occur in legal settings, for example, that certain proofs are excluded due to procedural rules. As such, “[r]eference to legally relevant tests and documents limits the search for the factual delineation of a controversy considerably”. As legal proceedings are (d) “characterized by the need to come to a final decision”, legal decision-makers cannot refuse to take a decision because “each party ‘has a point’”. In moral settings, however, certain dilemmas do not need to be decided.⁵³² This focus on decision-making is also relevant for the *second* point, namely that the *structure of legal decision-making* relies usually on third party settlement procedures. While in two party settlement procedures the decision in a conflict between two parties is taken by the two parties (examples are bargaining and diplomacy), third party settlement procedures work by invoking official rule-handlers (like judges or arbitrators) in order to decide cases between two opposing parties. These rule-handlers are authorized to take binding decisions and to delimitate what the law is. As law is not the only context where third party decision-making is important (other examples include theology and magic but would not count as ‘law’), it is the specific structure of legal communication that determines on who can be a legal decision maker and who not. Furthermore, legal decisions are binding and can be overruled only by decisions of other ‘higher’ legal bodies.⁵³³ *Third*, legal reasoning is for Kratochwil closely connected to certain rhetorical features.⁵³⁴ In this regard *topoi* (or commonplaces) stand out as they

⁵³¹ Kratochwil, *Rules, Norms, and Decisions*, 205.

⁵³² Kratochwil, 207.

⁵³³ In contrast to third-party settlement, first-party settlement is the prevailing mode of decision-making through a hegemon in international relations and bargaining is it for second-party settlement, Kratochwil, 181–187; see also Kratochwil, *The Status of Law in World Society*, 65–66.

⁵³⁴ The rhetorical tradition is important for Kratochwil as it is the link to praxis: ‘Rhetoric is concerned with the problem of praxis, i.e., with gaining adherence to an alternative in a situation in which no logically compelling solution is possible but a choice cannot be avoided’, Kratochwil, *Rules, Norms, and Decisions*, 210.

work as “seats of arguments”.⁵³⁵ As such, *topoi* do “not only establish ‘starting points’, but locate the issue of a debate in a substantive set of common understandings that provides for the crucial connections within the structure of the argument”.⁵³⁶ Furthermore, typification, the creation of sub-types (through further distinction) and the introduction of analogies are prominent rhetorical features of legal reasoning. In particular, *analogies* are important as they “establish similarities among different cases or objects in face of (striking) dissimilarities. The similarity established thereby concerns a (partial) equality among the compared objects or phenomena in regard to a relevant aspect”.⁵³⁷

Since the publication of *Rules, Norms, and Decision*, Kratochwil further developed his approach of the reconstruction of (international) law. Most notably two additions stand out, which are linked to what Wittgenstein described as ‘form of life’.⁵³⁸ First, Kratochwil increasingly emphasized the “historical and sociological background conditions” of what constitutes law as distinct ‘form of life’.⁵³⁹ This does not mean, however, that students of legal reasoning need to know everything about law’s history or the entire social background conditions. If we take, for instance, law’s history it is not necessary in order to understand how lawyers think to know the “past per se [...], but it is the past that is ‘present’”.⁵⁴⁰ In other words, students of international legal argumentation have to turn to Butterfield’s ‘Whig interpretation’ of the history of (international) law and how lawyers construct their own history and tradition.⁵⁴¹ Examining legal history in this way brings to the fore “that law is always part of a political project that connects the present via the past to a future ‘utopia’” and, as Kratochwil continues, “one of the primary means of making sense in individual and collective life”.⁵⁴² Second, to perceive law as a ‘form of life’ leads us to the observation that we have to reconstruct how it is ‘to

⁵³⁵ Kratochwil, 214.

⁵³⁶ Kratochwil, 219.

⁵³⁷ Kratochwil, 223; For a recent discussion of the relevance of analogies in legal reasoning see also Angela Condello, ‘Metaphor as Analogy: Reproduction and Production of Legal Concepts’, *Journal of Law and Society* 43, no. 1 (2016): 8–26.

⁵³⁸ Wittgenstein, *Philosophical Investigations*, para. 241.

⁵³⁹ Kratochwil, ‘Legal Theory and International Law’, 56.

⁵⁴⁰ Kratochwil, *The Status of Law in World Society*, 68–69.

⁵⁴¹ On Butterfield’s ‘Whig interpretation of history’ see my discussion in the introduction of the previous chapter and Herbert Butterfield, *The Whig Interpretation of History* (New York: Norton, 1965), chap. 1.

⁵⁴² Kratochwil, ‘Legal Theory and International Law’, 56.

think as a lawyer'. To 'think as a lawyer' resembles the 'learning of a language': "Learning such a language and speaking about the world in such a way means to participate in a practice, a shared form of life, as Wittgenstein has called it".⁵⁴³ This indicates that we have to better understand how the background conditions of law and, for instance, study how lawyers are trained as "what goes on is more a 'knowing how' than just a 'knowing what' (namely, the rules)".⁵⁴⁴ In other words, what is gaining weight in Kratochwil's work is an interest in the role of the lawyer and other forms of legal expertise.

3. Critical Legal Studies and International Law

I claimed towards the end of the preceding chapter as well as at the beginning of the present one that radical constructivists in IR have much in common – share many 'family resemblances' – with proponents of critical legal thinking in IL. In order to substantiate this point, I will examine in this section some of the basic assumptions of, probably, the two most influential critical scholars in the field of IL, David Kennedy (3.1) and Martti Koskenniemi (3.2). I will, in particular, focus on their earlier writings.⁵⁴⁵ Together with the reconstruction of radical constructivism and its take on international law, it will help me to lay out the foundations for the next section and its discussion of the various forms the linguistic turn was taken by critical scholars.

3.1 Kennedy

At least in the United States, David Kennedy is probably the most important "founding figure" of critical thinking in IL.⁵⁴⁶ His approach developed in close connection to the broader Critical Legal Studies (CLS) movement, which had his

⁵⁴³ Kratochwil, *The Status of Law in World Society*, 67.

⁵⁴⁴ Kratochwil, 67.

⁵⁴⁵ For a comprehensive overview, which includes more topics, see B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge: Cambridge University Press, 2017), chap. 5.

⁵⁴⁶ Akbar Rasulov lists four 'founding figures' to critical approaches in IL: Philip Allott, Anthony Carty, Martti Koskenniemi and David Kennedy, see Akbar Rasulov, 'New Approaches to International Law: Images of a Genealogy', in *New Approaches to International Law: The European and the American Experiences*, ed. José María Beneyto and David Kennedy (The Hague: T.M.C. Asser Press, 2012), 160.

main hub at Harvard Law School.⁵⁴⁷ While, during the 1970s and 1980s, the CLS movement was mainly concerned with strands of domestic law such as employment law, law of contract and constitutional law, its focus started to shift during the 1980s gradually towards comparative law analysis and, above all, international law.⁵⁴⁸ Since then, critical legal thinking increased rapidly in IL and should soon not be limited anymore to Harvard as it disseminated in particular to Europe and Australia. In the years that followed critical approaches in IL became also known as ‘New Approaches to International Law’ (short: ‘NAIL’) or, in opposition to the discipline’s ‘mainstream’, as ‘Newstream’ (sometimes also ‘New Stream’).⁵⁴⁹ Although the NAIL/Newstream was declared dead by its main representatives in the meantime, it has been an important starting and focal point as well as umbrella term for many critical projects that still play a central role in IL.⁵⁵⁰ In all these twists and turns Kennedy has been a central figure.

At the beginning of his career in the early 1980s, Kennedy attested “that international legal scholarship is in crisis” as the field is having more and more problems in order to handle the increasing complexities resulting from an “ever broader spectrum of players, ideologies and subject matters”.⁵⁵¹ For him, the feeling and experience of ‘uncertainty’ and ‘indeterminacy’ seemed to be all around. Like Onuf and Kratochwil in the case of IR, Kennedy tries to overcome the ‘crisis’ of the discipline of IL by incorporating ideas from other disciplines and connecting these ideas then to the study of the international legal discourse.

⁵⁴⁷ As an overview, see for example Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (London: Verso, 2015); and Günter Frankenberg, ‘Partisanen Der Rechtskritik: Critical Legal Studies Etc.’, in *Neue Theorien Des Rechts*, ed. Sonja Buckel, Ralph Christensen, and Andreas Fischer-Lescano, 2nd ed. (Stuttgart: Lucius & Lucius, 2009), 93–111.

⁵⁴⁸ Cf. Frankenberg, ‘Critical Legal Studies Etc.’, 98.

⁵⁴⁹ For original statements and overviews from within the movement, see David Kennedy, ‘A New Stream of International Law Scholarship’, *Wisconsin International Law Journal* 7, no. 1 (1988): 1–49; Carty, ‘Critical International Law’; and David Kennedy and Chris Tennant, ‘New Approaches to International Law: A Bibliography’, *Harvard International Law Journal* 35, no. 2 (1994): 417–60; see also the assessments by Deborah Z. Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’, *Nordic Journal of International Law* 65, no. 3 (1996): 341–83; and Rasulov, ‘New Approaches to International Law’.

⁵⁵⁰ On the end of NAIL, see David Kennedy, ‘When Renewal Repeats: Thinking Against the Box’, *New York University Journal of International Law and Politics* 32, no. 2 (2000): 489–500; and Thomas Skouteris, ‘Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship’, *Leiden Journal of International Law* 10, no. 3 (1997): 415–20.

⁵⁵¹ David Kennedy, ‘Theses about International Law Discourse’, *German Yearbook of International Law* 23 (1980): 356.

Furthermore, similar to the two ‘founding fathers’ of constructivism, Kennedy conceives international law as a form of argumentation and rhetorics. However, while the main (yet not only) source of inspiration for Onuf and Kratochwil was the analytic (and in the Anglosphere predominant) strand of the linguistic turn (with Searle for Onuf and Wittgenstein for Kratochwil), Kennedy draws more on the work of the CLS movement (mainly, Duncan Kennedy) and, when it comes to influences from outside of legal scholarship, on Continental thinkers ranging from Critical Theory to Semiotics and from Structuralism to Post-Structuralism.⁵⁵² In line with these influences, Kennedy is less interested in ‘solving’ the crisis of the discipline of IL in the traditional way, i.e. to present a solution for its renewal, but claims that the international legal argument cannot be stabilized, as every attempt for renewal was always the site for a new attempt of renewal – and this will not change. Projects of renewal are so complicated as “the discipline’s routine efforts to renew itself had reinforced rather than eliminated blindness and bias”.⁵⁵³ Consequently, instead of searching for new techniques to stabilize the international legal discourse, scholars following a more critical line of inquiry should, according to Kennedy, start to debunk the “characteristic blind spots and biases”.⁵⁵⁴ Such a project should “dislodge” and “displace” the prevailing accounts of international law and help “to begin the project of redrawing the discipline”.⁵⁵⁵ More generally, Kennedy also termed this project the project of “critical performativity”.⁵⁵⁶ Let me illustrate by pointing to three intertwined strategies how this project works.

First, Kennedy devotes a considerable part of his research to the history and historiography of international law. “The discipline of public international law has a keenly developed sense of history”, Kennedy observes and he continues to state: “much of the field’s theoretical and doctrinal debate is conducted as a debate about

⁵⁵² Kennedy is often quite opaque when it comes to his theoretical sources. However, a comprehensive overview of his main influences can be found in David Kennedy, ‘Critical Theory, Structuralism and Contemporary Legal Scholarship’, *New England Law Review* 21, no. 2 (1985): 209–89; see also Kennedy, ‘Theses about International Law Discourse’, n. 4.

⁵⁵³ Kennedy, ‘Thinking Against the Box’, 459.

⁵⁵⁴ David Kennedy, ‘The Disciplines of International Law and Policy’, *Leiden Journal of International Law* 12, no. 1 (1999): 9; see also Kennedy, ‘Thinking Against the Box’, 459.

⁵⁵⁵ Kennedy, ‘A New Stream of International Law Scholarship’, 6, 7 and 11.

⁵⁵⁶ Kennedy, ‘Thinking Against the Box’, 457.

history”.⁵⁵⁷ However, international legal scholars use history usually for two purposes. On the one hand, history helps to develop a narrative of IL as “a single story of international law’s progressive development”;⁵⁵⁸ on the other hand, it connects past, present and future in a particular way as it helps “constantly remembering a stable origin, foreshadowing a substantive resolution, but living in a procedural present”.⁵⁵⁹ Kennedy attempts, however, to problematize this prevailing use of history in IL. On the one hand, he tries to show that the discipline’s stable origin is not as stable as the ‘mainstream’ (makes us to) believe(s); on the other hand, he insists that the history of international law is a history full of ruptures and, consequently, not as stable and linear as usually presented. By studying the history and historiography of IL in this way, Kennedy also addresses what Kratochwil demanded (as we have seen in the previous discussion) for the history of international law, i.e. to reconstruct the ‘Whig history’ of the field and to uncover how lawyers construct their own history and tradition. In other words, Kennedy engages here in some kind of second-order or postmodern analysis of international law, i.e. he scrutinizes the modern(istic) historiography in his own field.

A good illustration of this approach is Kennedy’s lengthy piece on “Primitive Legal Scholarship” where he reconstructs the work of and on Francisco Vitoria, Francisco Suárez, Alberico Gentili and Hugo Grotius.⁵⁶⁰ According to Kennedy the era of ‘primitivism’ (pre-1648) precedes the traditional (1648-1900) and modern (1900-1980) period of international law. Modern mainstream historians of international law usually give little attention to this period and if they pay attention they use it for their purpose. For instance, Kennedy shows how both James Scott and Arthur Nussbaum make use of the ‘primitive’ period in their modern historiographies of international law – Nussbaum for the purpose of his legal positivist position while Scott from a naturalist point of view.⁵⁶¹ What these

⁵⁵⁷ Kennedy, ‘A New Stream of International Law Scholarship’, 12.

⁵⁵⁸ Kennedy, 13.

⁵⁵⁹ Kennedy, 2.

⁵⁶⁰ David Kennedy, ‘Primitive Legal Scholarship’, *Harvard International Law Journal* 27, no. 1 (1986): 1–98; important analysis of different periods of international law are also David Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, *Quinnipiac Law Review* 17, no. 1 (1997): 99–136; and, for the first half of the twentieth century, David Kennedy, ‘The Move to Institutions’, *Cardozo Law Review* 8, no. 5 (1987): 841–988.

⁵⁶¹ Kennedy, ‘Primitive Legal Scholarship’, 12.

histories have in common, however, is the idea that the work of the ‘primitives’ was “immature and incomplete” (for instance, as they did not distinguish between divine and non-divine law or between municipal and international law) and that only the events of 1648 and linked to this the Treaty of Westphalia brought the ‘stable origin’ to international law, which also constituted – as the story goes – the beginning of the modern system of states.⁵⁶² Likewise, modern accounts need the primitives to construct their history of progress as they can tell, for example, the story of the exclusion of religious arguments from (international) life and politics and link international law to the emergence of modern statecraft. In short, this helps to forge a “continuous discipline of international law”.⁵⁶³ Yet, Kennedy claims in opposition to these readings that “primitive international legal scholarship is unique, special, coherent and complete”.⁵⁶⁴ This is the case as writers such as Vitoria, Suárez, Gentili and Grotius were concerned with other problems and puzzles as traditional or modern international legal scholars, as they addressed, e.g., the question of authority in the Age of Discovery or the Reformation Era. To reconstruct the work of Vitoria, Suárez, Gentili and Grotius in this way has far-reaching consequences for today’s self-image of IL as the “coherence of the primitive parodies our eclectic confidence, so the diversity of primitive texts mocks the pretenses of our progress”.⁵⁶⁵

As a *second* strategy, Kennedy follows a specific style of writing. As Kennedy explains, the “strategy is to violate as many stylistic conventions as possible” while at the same time not to overstretch and “still in some way to be recognizable” as a “legal topic”.⁵⁶⁶ The aim is thus to scrutinize, stretch and redraw the boundaries of the discipline – in the end of what is legal and what not. It is thus not a style of rupture. We can find this strategy for instance in publications, in which Kennedy reconstruct his work outside of academia as a legal practitioner. The main examples are Kennedy’s work on humanitarian as well as military and

⁵⁶² Kennedy, 2.

⁵⁶³ Kennedy, 10–13.

⁵⁶⁴ Kennedy, 95.

⁵⁶⁵ Kennedy, 96.

⁵⁶⁶ David Kennedy, ‘Spring Break’, in *Knowledges: Historical and Critical Studies in Interdisciplinarity*, ed. Ellen Messer-Davidow, David R. Shumway, and David J. Sylvan (Charlottesville: University Press of Virginia, 1993), 422.

development expertise.⁵⁶⁷ In this context “[w]riting in the first person, avoiding footnotes, describing experiences and discussing sexuality” are ways to confuse the audience.⁵⁶⁸

We witness this strategy also in Kennedy’s reconstructions of post-Second World War scholarship in IL. These reconstructions are often written in the first person, very personal and avoid lengthy footnotes – with the latter being maybe the most confusing, as lengthy footnotes seem to be the main characteristic of the style of legal writings in North American academia. These articles are often keynote speeches, which remained in their written version nearly unchanged and unedited to the spoken word.⁵⁶⁹ To write about international law in this way makes international law, as Deborah Cass points out, a “personal quest”.⁵⁷⁰ Cass further describes this as follows:

“The personal quest device allows the writer to evoke a mood of disillusionment about international law which repeats a prominent substantive theme of work. The personal narrative style and the emphasis on the everyday behaviour of people brings the discipline to life stressing the human agency involved in its creation. The ironic, sometimes aggrandizing and shocking tone of the work highlights the melancholic conclusion of the personal voyage, and the objective nature of the law-making process is further undermined. Ultimately the continual representation of law as driven by two opposing forces idealism and realism, heightens the dramatic possibilities of the search for a resuscitated international law”.⁵⁷¹

⁵⁶⁷ Cf. Kennedy, ‘Spring Break’; David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2005); David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006); David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016).

⁵⁶⁸ Kennedy, ‘Spring Break’, 422.

⁵⁶⁹ Good examples are Kennedy, ‘Thinking Against the Box’, 457–500; and David Kennedy, ‘Tom Franck and the Manhattan School’, *New York University Journal of International Law and Politics* 35, no. 2 (2003): 397–435.

⁵⁷⁰ Cass, ‘Navigating the Newstream’, 369.

⁵⁷¹ Cass, 369.

To make international law – outside and inside the academic world (as well as *between* the academic and non-academic) – a personal quest links also to Kennedy's concept of international law. For Kennedy, international law is neither a process nor a system of rules. Instead, international law is “a series of professional performances”.⁵⁷² International law consists of “arguments and counter-arguments, rhetorical performances and counter-performances, deployed by people pursuing projects of different kind”.⁵⁷³

Third, Kennedy studies international law as rhetorics and (we will see the same below in Koskenniemi's project) makes ample use of what he calls earlier in his career “binaries” and (in more Marxist terms) “fundamental contradictions”⁵⁷⁴ and, later, “structured argumentative oppositions”.⁵⁷⁵ Deborah Cass speaks of “doubles”.⁵⁷⁶ Kennedy's vantage point here is the indeterminacy debate international law.⁵⁷⁷ Kennedy argues in this context that every legal question is constructed around different ‘doubles’ like sovereignty and international community, dualism and monism, autonomous law and law as politics, positivism and naturalism, and so on.⁵⁷⁸ These ‘binaries’ are at each level “two mutually exclusive possibilities which never exist without each other”.⁵⁷⁹ They are exclusive, as they seem to cover all possible positions when it comes to argue about a certain topic. Every position carries, in other words, its own opposite or contradiction. These different positions can be tied up into different projects. However, this does, on the one hand, not open the door too full arbitrariness, as it does not mean that at a certain period of time everything can be combined with everything. “Skilled theorists”, Kennedy assures, “can move easily among these positions” and they “are simultaneously those whose arguments seem hardest to challenge and those who experience the most comprehensive inclusiveness when speaking with one

⁵⁷² Kennedy, ‘Thinking Against the Box’, 337.

⁵⁷³ Kennedy, *A World of Struggle*, 269; similarly, David Kennedy, ‘Lawfare and Warfare’, in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 173.

⁵⁷⁴ Kennedy, ‘Theses about International Law Discourse’, 361–367. In this context Kennedy's main source of inspiration is Duncan Kennedy, ‘The Structure of Blackstone's Commentaries’, *Buffalo Law Review* 28 (1979): 211–222.

⁵⁷⁵ Kennedy, ‘Thinking Against the Box’, 457.

⁵⁷⁶ Cass, ‘Navigating the Newstream’, 362–365.

⁵⁷⁷ Kennedy, ‘Theses about International Law Discourse’, 359.

⁵⁷⁸ For a list of different ‘doubles’ in different contexts, see Kennedy, ‘Thinking Against the Box’, 348–365.

⁵⁷⁹ Kennedy, ‘Theses about International Law Discourse’, 364.

another”.⁵⁸⁰ On the other hand, this helps Kennedy to describe *transformation*. Although the basic oppositions (like sovereignty/international community or naturalism/positivism) remain stable they can move between different levels (e.g., sovereignty tied to positivism can move to sovereignty tied to naturalism).⁵⁸¹ This explains also that international law is fluid, unstable and indeterminate, as it cannot serve as a technique to solve ethical and political questions. The observation of the binary and transformational nature of the international legal argument has fundamental consequences as it shows how “fluid” and “interminable” the international legal discourse is. Kennedy describes this elegantly in the last paragraph of his first monograph *International Legal Structures*:

“Once [...] social difficulties have been transformed into rhetorical alternatives, alternatives which invoke social choice in only the most hyperbolic fashion. The field of rhetorical maneuver, for all its structure and repetition, seems able to extend itself to infinity. To a certain extent this results from what seems to be the fluidity and logical indeterminacy of the rhetorical frameworks characteristic of each discourse. To a certain extent it results from the numerous ways in which a set of accommodative balances and temperings of one rhetoric by another can produce a feeling of closure and determinacy. To a certain extent it results from the patterns of repetition and mutual referral which run through the public international law system. And I suppose it is also a matter of accident and luck. But the interminability of international law seems the subtle secret of its success”.⁵⁸²

⁵⁸⁰ Kennedy, 363.

⁵⁸¹ Kennedy illustrates it in the following way: ‘Consider argument strictly about the ideals of domestic particularism and international solidarity (X/Y). Consider two other ideal oppositions: free will/ communal will (A/B), and independence-authority/ equality-mutual respect (C/D). Free will seems associated with particularism, as does independence-authority. Communal will seems associated with solidarity, as does equality respect. It seems that the same principle separates each polarity. Symbolically (X like A like C) opposed to (Y like B like D). Yet sometimes the poles seem contradictory and sometimes they seem compatible. Particularism and solidarity, like free will and communal will seem opposed. But independence-authority seems compatible with equality-respect. Without mutual respect there can be no independence. Absolutely independent entities must be equal. Independence seems to foreclose a hierarchy. In other words Y opposes Y and A opposes B but C is compatible with D. The contradiction of X opposes Y or A opposes B can be mediated by moving to C is compatible with D’, Kennedy, 365.

⁵⁸² Kennedy, *International Legal Structures*, 294.

Moreover, the fluidity and indeterminacy of the international legal discourse has as one important consequence that international law cannot serve as a means or technique to solve ethical and political questions – in particular, if ‘solving’ means to dissolve them by providing an end to the debate by implementing a stable foundation and means of fixation. Rather international law is in itself the site of struggles between different ethical and political projects. As we will see below, Kennedy connects this approach of studying the structure of the legal argument in his more recent research to the social underpinnings of these struggles and here particularly to the way legal experts and expertise structure the international.

3.2 Koskenniemi

Even though Martti Koskenniemi’s career is mainly situated in the European context, his work shares many similarities with Kennedy’s. As Kennedy describes their early projects retrospectively, both were “engaged in a multi-year scholarly project on a really crazy scale --- to rewrite the entire history and all the doctrines of international law in a new way, in a single unified intellectual framework”.⁵⁸³ Hence, Koskenniemi shares with Kennedy a strong interest in the history and historiography of international law. Yet, while both examine the early history of the field in a similar way, they practice some kind of division of labour when it comes to more recent developments. As we have seen, Kennedy main focuses in this regard on the transformations of the field in the United States since the Second World War. Koskenniemi, on the other hand, reconstructs rather the European tradition and – as we have seen in the discussion on interdisciplinarity and counterdisciplinarity in the previous chapter – ends with its fading out in the US academia.⁵⁸⁴ Moreover, Koskenniemi shares from time to time Kennedy’s textual

⁵⁸³ David Kennedy, ‘The Last Treatise: Project and Person (Reflections on Martti Koskenniemi’s from Apology to Utopia)’, *German Law Journal* 7, no. 12 (2006): 984.

⁵⁸⁴ This is, of course, the topic of his powerful monograph Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001). Koskenniemi published also on the historiography of international law. These studies are conducted as in the case of Kennedy from a second-order perspective (i.e. they scrutinize how the discipline’s historians write their histories), see, for example, Martti Koskenniemi, ‘A History of International Law Histories’, in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender et al. (Oxford: Oxford University Press, 2012), 943–71; Martti Koskenniemi, ‘Histories of International Law: Significance and Problems for a Critical View’, *Temple International and*

strategy of undermining the prevailing writing style of law journals.⁵⁸⁵ Likewise he is mainly concerned with analysing the forms and dynamics of the argumentative structure of the international legal discourse. In the remainder of this sub-section I will primarily focus on this last aspect of Koskenniemi's work. By focussing on this, i.e. the way Koskenniemi depicts the *argumentative structure of IL*, I will be able to show some major differences.

Koskenniemi's interest in the structure of international legal argumentation is closely connected to his seminal study *From Apology to Utopia*, first published in 1989, and the related journal article *The Politics of International Law*, released one year later and being the opening article in the back then newly established *European Journal of International Law*.⁵⁸⁶ The vantage point in these early publications – but it should be a recurring thread running through Koskenniemi's entire work – is an unease with what he calls “*the liberal theory of politics*”.⁵⁸⁷ According to Koskenniemi all modern international lawyers stick to this general sensibility at least to some extent. This sensibility is articulated in the legal discourse, for instance, in a (formalist) mainstream focusing on the formal application of law – something that is leaving political and sociological questions aside. Such a concept of law (in its most extreme version in the form of ‘legalism’) attempts to eliminate politics from law and to establish a hierarchy where law, if used in an appropriate way, trumps politics.⁵⁸⁸ Koskenniemi contrasts this ‘liberal theory of politics’ and argues, instead, that law and politics are inseparable. Yet, Koskenniemi does not follow the realist framework here where politics trumps law and where politics remains *external* to law.⁵⁸⁹ Instead, Koskenniemi uses (similarly to Kennedy) an *internal* perspective and conceptualises politics and law

Comparative Law Journal 27, no. 2 (2013): 215–40; and Martti Koskenniemi, ‘Expanding Histories of International Law’, *American Journal of Legal History* 56, no. 1 (2016): 104–12.

⁵⁸⁵ The main example is Martti Koskenniemi, ‘Letter to the Editors of the Symposium’, *American Journal of International Law* 93, no. 2 (1999): 351–61; see also Koskenniemi's comment on the use of footnotes in Koskenniemi, *From Apology to Utopia*, 15.

⁵⁸⁶ The book, originally published in 1989, was re-issued in 2005. The 2005-edition includes a long epilogue where Koskenniemi addresses major questions and critiques regarding the first edition, Koskenniemi, *From Apology to Utopia*; Martti Koskenniemi, ‘The Politics of International Law’, *European Journal of International Law* 1, no. 1 (1990): 4–32.

⁵⁸⁷ Koskenniemi, *From Apology to Utopia*, 5 (emphasis in the original).

⁵⁸⁸ Koskenniemi speaks of ‘the liberal impulse to escape politics’, Koskenniemi, ‘The Politics of International Law’, 6.

⁵⁸⁹ The most prominent example of the external position in international thought is the work of Morgenthau. On this, see my discussion in Chapter 2.

as intertwined and inseparable when he speaks of the ‘politics of international law’: international law operates, on the one hand, “as a (vocabulary for) politics”.⁵⁹⁰ Yet, on the other hand, Koskenniemi emphasises the way international law constitutes the international and structures international politics. As noted in the introductory chapter, Koskenniemi argues thus to overcome a conceptualisation of law and politics as two separated spheres – the way a ‘liberal theory of politics’ would do – and, instead, to see them as intertwined.

As a consequence, Koskenniemi’s work is as an intervention into the discipline of IL as it foregrounds the politics involved in international legal argumentation (and, thus, argues that lawyers cannot escape politics). It is, among other things, in this very explicit treatment of ‘the political’ where Koskenniemi’s project differs from the one of Kennedy. Yet, the background operation and, thus, the reason why international law and politics are intertwined is a similar one. It is the idea that the international legal discourse itself is interminable and indeterminate. To substantiate this point, Koskenniemi draws as Kennedy on Continental philosophical work, yet more in the tradition of French structuralism and in this regard mostly on the work of Ferdinand the Saussure.⁵⁹¹ These influences help Koskenniemi to reconstruct the structure – or as he also calls it: the ‘grammar’ – of international legal argumentation.⁵⁹² According to Koskenniemi, international legal argumentation does not derive its indeterminacy from the indeterminacy of norms and concepts – as if norms and concepts would have a stable and determinate core and only indeterminate edges – but is a “structural property of the international legal language itself”.⁵⁹³ And, as it constitutes a structural property, it is not possible to eliminate indeterminacy from international legal discourse. The reason why international law is indeterminate

⁵⁹⁰ Martti Koskenniemi, ‘Preface’, in *The Politics of International Law*, ed. Martti Koskenniemi (Oxford: Hart, 2011), v (emphases in the original).

⁵⁹¹ Koskenniemi, *From Apology to Utopia*, 6–14.

⁵⁹² It is interesting to note how the notion of ‘grammar’ seems to shift within Koskenniemi’s work. While the notion derives in his early attempts from Saussure’s structuralism it seems to be in his later self-interpretation stronger related to what the late-Wittgenstein understood as ‘grammar’. However, it is a rather structuralist reading of Wittgenstein. See Koskenniemi, 566–573. For a recent restatement of structuralism as main influence see: Martti Koskenniemi, ‘What Is Critical Research in International Law? Celebrating Structuralism’, *Leiden Journal of International Law* 29, no. 3 (2016): 727–35.

⁵⁹³ Koskenniemi, *From Apology to Utopia*, 62.

are the “*contradictory assumptions*” of international law itself.⁵⁹⁴ As it was the case for Kennedy, Koskenniemi deconstructs international law by focussing on the examination of ‘doubles’ or ‘binaries’. However, where Kennedy identified several *initially unrelated doubles*, which can then be assembled in different ways, Koskenniemi argues that everything is reducible to *one binary* – the binary of ‘normativity’ and ‘concreteness’ – and that all other binaries are only *manifestations* of this fundamental binary. For instance, arguments about concreteness usually play out in the language of consent, autonomy, process and as *apology* for state practice; on the other side, arguments about normativity play out in the language of justice, community, rule and as *utopia* beyond state practice.⁵⁹⁵ Simultaneously, the binary of normativity and concreteness links also back to the liberal theory of politics as – “[a]t a deeper level” – the liberal theory assumes that, on the one hand, “legal standards emerge from the legal subjects themselves” (i.e., they are concrete) while, on the other hand, “once created, social order will become binding on these same individuals” (i.e., they are normative).⁵⁹⁶ This helps Koskenniemi also to distinguish *legal* arguments from political or moral arguments: while, on the one hand, political argumentation has always to appear as concrete and, on the other hand, moral argumentation always as normative, legal argumentation in turn has to appear as both, normative and concrete, at the same time. Put differently, if we follow Koskenniemi, international law is rooted on the paradox that it has to be normative and concrete at the same time. This is however not a problem but its condition of possibility.⁵⁹⁷ And, it is the power of the ‘liberal theory of politics’ that it is able to make its own roots invisible. The task for the critical international lawyer is now to excavate the ‘deep structure’ of international legal argumentation.⁵⁹⁸

Furthermore, the double normativity/concreteness is not stable and open to transformation. As we have seen above, Kennedy argued that it is the ‘jump’ from one binary to another, which is responsible for shifts in international legal

⁵⁹⁴ Koskenniemi, 62.

⁵⁹⁵ Cf. Koskenniemi, ‘The Politics of International Law’, 8.

⁵⁹⁶ Koskenniemi, *From Apology to Utopia*, 21.

⁵⁹⁷ See on this point also: Oliver Kessler, ‘Toward a Sociology of the International? International Relations between Anarchy and World Society’, *International Political Sociology* 3, no. 1 (2009): 102.

⁵⁹⁸ Koskenniemi, ‘What Is Critical Research in International Law?’, 727.

argumentation. Yet, as Koskenniemi conceptualises the structure of the international legal argument as consisting of one fundamental and stable binary (normativity/concreteness) with different manifestation, he has to introduce the dynamics and transformations of international legal argumentation in a slightly different way. “The dynamics of international legal argumentation are provided”, Koskenniemi explains,

“by the constant effort of lawyers to show that their law is either concrete or normative and their becoming thus vulnerable to the charge that such law is in fact political because apologist or utopian. Different doctrinal and practical controversies turn on transformations of this dilemma. [...] This provides an argumentative structure which is capable of providing valid criticism of each substantive position but which itself cannot justify any”.⁵⁹⁹

It is thus the possibility of permanent critique, which makes international law fluid. This observation has in turn at least three important consequences.

First, international law’s “argumentative structure is there only to avoid openly political rhetoric. But alone, it leads nowhere but into the *constant opposition, dissociation and association of points about concreteness and normativity* of the law. There is no end to this”. This means also, that international law is not a “non-political way of dealing with international disputes”.⁶⁰⁰ Every political position can be articulated within the language of international law by emphasising either its normativity or concreteness – or both. Put differently, international law does not provide us with an algorithm to decide political questions.

Second, Koskenniemi turns the focus of his research increasingly to the work and life of international lawyers. According to Koskenniemi, this is necessary

⁵⁹⁹ Koskenniemi, ‘The Politics of International Law’, 8.

⁶⁰⁰ Koskenniemi, *From Apology to Utopia*, 68–69.

as “[i]nternational Law is what international lawyers do and how they think”.⁶⁰¹ In this regard, Koskenniemi produced a couple of studies, which reconstructed the intellectual biographies of international lawyers. Most notably is probably the work on Hersch Lauterpacht.⁶⁰² Furthermore, the double of normativity and concreteness translates, as Koskenniemi observes, in the *everyday life and work* of lawyers into a choice between commitment and cynicism – between utopian commitment and apologist cynicism. As Koskenniemi shows, we can find the tension between commitment and cynicism in all the working areas and in all the roles of international legal experts – ranging from judges to advisers and from activists to academics.⁶⁰³

Third, Koskenniemi is increasingly concerned with the question of what makes an international lawyer a good or, how he frames it, “competent” international lawyer.⁶⁰⁴ In this context, the following comprehensive definition of international law is indicative as it also includes many themes already discussed above. It helps me thus to summarize Koskenniemi’s concept of international law and prepare the discussion of expertise in the next chapter:

“International Law is an argumentative practice. It is about persuading target audiences such as courts, colleagues, politicians, and readers of legal texts about the legal correctness—lawfulness, legitimacy, justice, permissibility, validity, etc—of the position one defends. What passes for method, in other words, has to do with what counts as persuasive arguments in international law. Key to persuasiveness is that the argument is recognizable as a good *legal* argument and not, for example, a strong *moral* point, a plausible *political* position, or a

⁶⁰¹ Martti Koskenniemi, ‘Between Commitment and Cynicism: Outline of a Theory of International Law as Practice’, in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York: United Nations, 1999), 523.

⁶⁰² Martti Koskenniemi, ‘Lauterpacht: The Victorian Tradition in International Law’, *European Journal of International Law* 8, no. 2 (1997): 215–63; republished with some changes in Koskenniemi, *The Gentle Civilizer of Nations*, chap. 5; Martti Koskenniemi, ‘Hersch Lauterpacht (1897-1960)’, in *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2004), 601–62; and Martti Koskenniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’, *Journal of International Criminal Justice* 2, no. 3 (2004): 810–25.

⁶⁰³ See in particular Koskenniemi, ‘Between Commitment and Cynicism’.

⁶⁰⁴ On competence see the discussion in Koskenniemi, *From Apology to Utopia*, 567–572.

convincing *sociological* description of something [...]. Anyone may, of course, operate the binary code of legal/illegal that constitutes the stuff of international legal arguments. But it is the consensus in the profession—the *invisible college* of international lawyers—that determines, at any moment, whether a particular argument is or is not persuasive. This does not mean that it would be impossible to outline criteria by which professional audiences typically recognize arguments as legally persuasive. The methodology of international law is best seen as being about criteria that legal arguments ought typically to fulfil in different contexts—including the academic context—in order to seem plausible. These criteria may be grouped into two: normativity and concreteness. A persuasive argument is one that appears both normative *and* concrete”.⁶⁰⁵

4. Conclusion: From the Linguistic Turn(s) to the Historical and Social Preconditions of International Legal Argumentation

To recapitulate, the previous discussion of the four projects of Onuf, Kratochwil, Kennedy and Koskeniemi revealed that radical constructivism and critical approaches to international law share many similarities. Although the vantage point may seem different due to the different disciplinary traditions and (resulting from this) cognitive interests – as the initial puzzle for Onuf and Kratochwil was the presumption of anarchy while for Kennedy and Koskeniemi it was the question of indeterminacy – all four authors claim that the crises in their respective disciplines were caused by (a certain strand of) liberal political theory. Likewise all four authors attempt to overcome these crises by introducing the various strands of the linguistic turn – Onuf and Kratochwil more the postanalytical, Kennedy and Koskeniemi more the hermeneutical version – to their fields: they highlight legal ‘argumentation’, speak of the ‘rhetoric’, ‘grammar’ and ‘practice’ of international law and study law as ‘language’. This helps Onuf and

⁶⁰⁵ Martti Koskeniemi, ‘Methodology of International Law’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007) (emphases in the original); the point that the success of an argument is not (only) about the speakers intention but is in the end (also) determined by the audience is, of course, originally John L. Austin’s, see John L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962).

Kratochwil to show that the ‘international’ is structured by rules and norms, which in turn are only accessible by relying on an interpretative methodology; and it helps Kennedy and Koskeniemi to make a virtue out of necessity as they show that, although international law cannot eliminate indeterminacy, to study it as language can make one’s own biases and blind spots visible and helps then to move on from a critical standpoint. However, if we frame it in this way, the disciplinary boundaries between both disciplines are still quite firm: on the one hand, was the problem with the presumption of anarchy and the way of tackling it was a recourse to *postanalytic* philosophy (Onuf and Kratochwil); on the other hand, stands the puzzle of indeterminacy and the solution (a solution, which does not solve but helps to move on) was found in *hermeneutics* (Kennedy and Koskeniemi).

Yet, as I would like to point out in the remainder of this chapter, there is another way of dealing with the different ways the linguistic turn was taken by Onuf, Kennedy, Koskeniemi and Kratochwil. This is so, as to distinguish between a postanalytical and a hermeneutic version is not the only way to map the linguistic turn. As philosopher Sybille Krämer convincingly proposes in her alternative “‘logical geography’ of 20th century language theory” it is also possible to distinguish between a ‘*performance model*’ and a ‘*two worlds model*’ of language.⁶⁰⁶ As we will see Kennedy and Kratochwil rather belong to the first camp, while Koskeniemi and Onuf to the second one. As Krämer introduces it, the ‘two worlds model’ of language is characterized by an ontological division of speech (speaking) and language. Language is behind speech; speech becomes a pattern in the actualisation of language.⁶⁰⁷ This produces a hierarchical relationship where language is superior to speech. Representatives of the ‘two world model’ are, according to Krämer, for example, Saussure, Chomsky, Searle and Habermas.⁶⁰⁸ As Krämer continues, typical for these authors is for example that they recognise “grammatical or pragmatic universals in which everything that can

⁶⁰⁶ Sybille Krämer, ‘Is There a Language “Behind” Speaking? How to Look at 20th Century Language Theory in an Alternative Way’, in *Language and World, Part Two: Signs, Minds and Actions*, ed. Volker Munz, Klaus Puhl, and Joseph Wang (Frankfurt: Ontos, 2013), 39; for a more comprehensive version of her argument: Sybille Krämer, *Sprache, Sprechakt, Kommunikation: Sprachtheoretische Positionen des 20. Jahrhunderts* (Frankfurt: Suhrkamp, 2001).

⁶⁰⁷ This can be read as another form of modernity’s distinction between reason and thought.

⁶⁰⁸ Krämer, *Sprache, Sprechakt, Kommunikation*, 10.

be refereed to as ‘language’ or ‘speech’ takes part”; that language is “invisible” behind speech as a “deep structure”, which “has to first be made accessible”; that proponents of this model refer to rules as to “explain language and communication means to describe the rules we obey when we speak”; that in turn these “rules specify the necessary and sufficient conditions for linguistic and communicative creativity”; and, that therefore the focus lies on the “competence” to speak a certain language.⁶⁰⁹ We have seen such an understanding of the relationship of language and speech in the accounts of Onuf and Koskenniemi. For instance, Onuf largely followed Searle’s strategy in reconstructing a typology of types of rules (instruction-rules, directive-rules, and commitment-rules), which are actualised in speech acts, social activities, forms of rule and different types of law; typology is, as Onuf claims, ‘universal’.⁶¹⁰ Koskenniemi in turn mainly took the Saussurean route in order to find the ‘deep structure’ of international legal argumentation, which plays out in the underlying root dichotomy of normativity and concreteness.⁶¹¹ Other binaries become in Koskenniemi’s take then only actualisations of normativity and concreteness. Furthermore, Koskenniemi emphasises that someone becomes a lawyer when he or she ‘competent’ in speaking that language, i.e., using the underlying ‘grammar’ in the right way.⁶¹²

The ‘two level model’ of language was, as Krämer explains, criticised and rejected by a number of authors such as the later Wittgenstein, Austin, Luhmann, Lacan, Davidson, Derrida and Butler. What these authors have in common is that they turn from a ‘two world model’ to a ‘performance model’ of language. This means that the ontologically sharp boundary between speech and language collapses. There is no ‘behind’ anymore and the focus shifts to the ‘use’ and ‘performance’ of language.⁶¹³ Speaking with Derrida, language is not the anchor of *logos* (reason, etc.) anymore. Here, for example, a Wittgensteinian approach, which mainly informs Kratochwil’s work, would emphasise that “language games do not lie behind or on top of each other, but side by side. There are no universal patterns

⁶⁰⁹ Krämer, ‘Is There a Language “Behind” Speaking?’, 39–42.

⁶¹⁰ For Searle’s original statement see, for example: Searle, *Expression and Meaning*.

⁶¹¹ For Saussure’s original statement see: Ferdinand de Saussure, *Course in General Linguistics* (New York: Columbia University Press, 2011).

⁶¹² The idea to link ‘language’ to ‘grammar’ and ‘grammar’ to ‘competence’ goes back to Noam Chomsky, *Aspects of the Theory of Syntax* (Cambridge: MIT Press, 1965).

⁶¹³ See Krämer, *Sprache, Sprechakt, Kommunikation*, 12–13.

and forms upon which individual cases are based”.⁶¹⁴ Or, Kennedy’s poststructuralist understanding of ‘binaries’, in particular the way binaries move and transform but where still ‘renewal repeats’, replaces a structuralist argument of ‘deep structures’ by foregrounding, if we use a Derridian vernacular, that there “is no ‘pure’ signifying system because every actual signifying event is a *trace* of a past signifying event, which it both repeats as transforms”.⁶¹⁵ Let me briefly illustrate by means of two examples the difference between both models. Firstly, for both Saussure and Wittgenstein, as also Koskeniemi and Kratochwil, the term ‘grammar’ plays a central role. Yet, while, on the one hand, for Saussure grammar refers to the underlying structure of language (*langue*) and where speaking (*parole*) is an actualisation of this grammar, Wittgenstein’s approach is, on the other hand, “essentially unsystematic”.⁶¹⁶ As a consequence, an analysis of the grammar allows for Wittgenstein only for a ‘perspicuous representation’ (*übersichtliche Darstellung*), which is in the end ‘only’ the translation from one language game to another. Secondly, to distinguish between the two models has also interesting implications for the way we conceptualise ‘practices’ and the ‘practice turn’, which swapped recently to both IR and IL. The question is here, whether there is, for instance, tacit knowledge (in the sense of unformulated language) ‘behind’ practices or not. An approach taking the ‘two worlds model’ assumes the former. Yet, from a ‘performance model’ point of view “[t]heorizing or describing a practice is best conceived as a translation from one social practice to another. Thus, formulability can only be comprehended as relationship between two practices, not as a general characteristic of a practice”.⁶¹⁷ Here, the question of whether there is something behind practices resolves into a *Scheinproblem*.

Though by way of summarizing, what is also interesting to see, when we map the way Onuf, Kennedy, Koskeniemi and Kratochwil take the linguistic turn along the line of whether they pursue a ‘performance’ or ‘two world model’ of language, is that this line does not follow the boundary between the disciplines. What I do not claim here is that one of these different ways of dealing with the

⁶¹⁴ Krämer, ‘Is There a Language “Behind” Speaking?’, 45.

⁶¹⁵ Krämer, 47 (emphasis in the original).

⁶¹⁶ Marie McGinn, *The Routledge Guidebook to Wittgenstein’s Philosophical Investigations* (London: Routledge, 2013), 30.

⁶¹⁷ Mattias Wahlström, ‘Unformulable Practices? Articulating Practical Understanding in Sociological Theory’, *Distinktion: Scandinavian Journal of Social Theory* 13 (2006): 121.

linguistic turn is better than the other. I also do not claim that these different ways of dealing with it are incompatible and mutually exclusive per se. All of them are perfect examples of a logic of reconstruction. Yet, by means of mapping them in this way it is possible to see where important differences and similarities are and by doing so making 'translation' between these positions possible – yet, without attempting to create some monolithic synthesis of some kind of a 'joint discipline' of critical approaches. Even though I am following in this thesis rather the 'performance model' of language as exemplified in this chapter by Kratochwil and Kennedy,⁶¹⁸ I will nevertheless come back repeatedly to arguments, which are derived from or come closer to the way Onuf and Koskenniemi conceive the linguistic turn. Different problems need different analytical vocabularies.

While I mapped towards the end of this chapter how the different scholarly projects of Onuf, Kratochwil, Kennedy and Koskenniemi study the politics of international law from a language point of view, recent scholarship increasingly developed two additional themes, namely a focus on the *social and historical underpinnings of international legal argumentation*. This does in turn not mean that these new interest abandon the linguistic turn as the way the history or the social is always informed by our understanding of language.⁶¹⁹ In the next chapter (Chapter 4) I will introduce scholarship on the 'politics of expertise' in international law, which contributes to the question of the social underpinnings of the politics of international law. Chapter 5 provides then a comprehensive historical reconstruction of the concept of jurisdiction and attempts thereby to contribute to the recent 'turn to history' among critical scholars in both disciplines.

⁶¹⁸ Kennedy and Kratochwil are, of course, not the only critical scholars in the intersection of IL and IR, who follow this model. Anne Orford's 'praise of description', which I introduced in Chapter 1, is another example: Anne Orford, 'In Praise of Description', *Leiden Journal of International Law* 25, no. 3 (2012): 609–25.

⁶¹⁹ Yet, it might be more implicit and less explicit as in the, what Koskenniemi recently called, 'over-theoretical 1980s', when Kennedy, Koskenniemi, Kratochwil and Onuf published their ground-breaking monographs, Koskenniemi, 'What Is Critical Research in International Law?', 727.

Part II: Projects of International Law and Politics

Chapter 4: The Politics of Expertise and Technicalities in International Law

1. Introduction

The politics of international law, as international politics in general, is increasingly a politics of expertise. In order to substantiate this point let me introduce this chapter with a couple of examples. Examples abound:

- The marginalization of human rights within the setting of the World Bank can be explained as a result of a “clash of expertise” – a clash between human rights oriented lawyers and economists that was decided in favour of the latter as the lawyers usually had to ‘translate’ their positions into the language(s) of economics – and not vice versa. However, and this was the ‘problem’ for the human rights oriented lawyers, the structure of the economic argument and the “organizational culture” of the World Bank are not designed to give human rights claims a very prominent position. At the utmost, rights are ‘translated’ into the instrumental-consequentialist language of *Law and Economics* – being more about law *through* economics than law *and* economics – where rights become ‘economised’ in terms of prices but are surely not ‘legalized’ in terms of entitlements.⁶²⁰
- In the context of European integration, we can see how a ‘turn to law’, legal managerialism, fragmentation, translation and expertise work hand-in-hand. As R. Daniel Kelemen notes in a study of the legal culture of European integration, the European Union does have a “special touch of its own, which we might call ‘the juris touch.’ It seems that nearly everything the European Union touches turns into law”.⁶²¹ Above all, this becomes visible in a general turn to the “language of rights” as more and more policies are framed in terms of rights – with economic rights being the driving force of economic

⁶²⁰ Galit A. Sarfaty, ‘Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank’, *American Journal of International Law* 103 (2009): 647–83.

⁶²¹ R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge: Harvard University Press, 2011), 19.

liberalization.⁶²² The language of rights is particularly effective as “framing legal norms as rights has distinct advantages for promoting deeper integration and greater legitimacy”.⁶²³ At the same time, European integration produces *vertical* – between the EU and its member states – and *hierarchical* – within the bodies of the EU, namely between the Council, the Parliament, the Commission and the European Court of Justice (ECJ) – forms of *fragmentation*.⁶²⁴ Taken together these distinct processes generate a deep transformation within the ‘legal field’ of Europe, which Kelemen assembles under the label “Eurolegalism”.⁶²⁵ While the traditional or ‘Old European’ (i.e., Continental European) model of law is based on the authority of the legal science – what Bourdieu termed ‘law of the professors’ with legal academics at the top of the legal pyramid –, ‘Eurolegalism’ rests on the other hand substantially on the (Anglo-)American model with its focus on litigation; and where law firms are the dominant actors in the legal field.⁶²⁶ The main articulation of the latter approach to law is what Robert A. Kagan has dubbed “adversarial legalism” and which he describes as

“policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation. Adversarial legalism can be distinguished from other methods of governance and dispute resolution that rely instead on bureaucratic administration, or on discretionary judgment by experts or political authorities, or on the judge-dominated style of litigation”.⁶²⁷

However, as Kelemen convincingly suggests, we should rather conceptualise the relationship between ‘Eurolegalism’ and ‘adversarial legalism’ as ‘translation’ (my words) than as a direct “transfer, or ‘transplant,’ of legal

⁶²² Kelemen, 45–52.

⁶²³ Kelemen, 51.

⁶²⁴ Kelemen, 24.

⁶²⁵ Kelemen, 8.

⁶²⁶ Cf. David M. Trubek et al., ‘Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transitional Arenas’, *Case Western Reserve Law Review* 44, no. 2 (1994): 421–426; see also my discussion above on Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, *Hastings Law Journal* 38 (1986): 805–53.

⁶²⁷ Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001), 3.

norms and practices from one country to another” and connect both through Wittgenstein’s notion of “family resemblance”.⁶²⁸ In the end, however, it was the turn to the specific ‘form of life’ of ‘Eurolegalism’ that facilitated and perpetuated many austerity measures within the Eurozone as it helped to ‘normalize’ the economic ‘state of exception’ of the ‘Eurozone crisis’ by framing genuine political questions in the a-political vocabulary of legal managerialism.⁶²⁹

- We can also observe fundamental transformations in the context of the law of force – and, here, in both the *ius ad bellum* as well as in the *ius in bello*. As David Kennedy highlights,

“Warfare has become a legal institution. At the same time, as law has increasingly become the vocabulary for international politics and diplomacy, it has become the rhetoric through which we debate—and assert—the boundaries of warfare, and insist upon the distinction between war and peace or civilian and combatant”.⁶³⁰

Given this observation, an increasing number of conflicts is today not only decided on the battlefield but also conducted between different communities of international legal expertise, in particular between humanitarian and military professionals. On the one side, as Kennedy describes it, stands a “cadre of humanitarian policy experts” which would advocate “the world’s general interest in peace” – an interest and desire which would “be designed, built, mandated and managed by law” and where the “world of rules, of procedures, of wise conflict management would, should, sneak up on war, infiltrate the military, overwhelm the evil statesman, and make war a matter of the past. We would regulate swords into ploughshares”.⁶³¹ On the other side,

⁶²⁸ Kelemen, *Eurolegalism*, 38, 37.

⁶²⁹ R. Daniel Kelemen, ‘Law, Fiscal Federalism, and Austerity’, *Indiana Journal of Global Legal Studies* 22, no. 2 (2015): 379–400; see also my discussion in Filipe dos Reis, ‘Law, Politics and State(s) of Emergency’, *New Perspectives. Interdisciplinary Journal of Central & East European Politics and International Relations* 25, no. 2 (2017): 136–41.

⁶³⁰ David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006), 5.

⁶³¹ Kennedy, 30–31.

there are the military professionals, which also “have desires for law”;⁶³² these desires for law, are however different and rest in the often-unnoticed “war-generative functions of law”. Law organises, for instance, the whole logistics of war, from the buying and selling of weapons to the recruitment of soldiers; it helps to discipline troops and make divisions on the battlefield; it draws a boundary between “the military and civilian political and commercial elites in war”; and, most importantly, it assures that “killing is authorized and legitimate”.⁶³³ Soldiers are authorized to kill because there exists law and not in spite of it. The conflicts between humanitarian and military legal experts are usually staged in the often highly technical legal languages of self-defence, proportionality or necessity.⁶³⁴ In line with this general development, observers and participants came to the conclusion that it might be adequate to speak in the context of war not only of warfare but also to introduce the term ‘lawfare’.⁶³⁵

- Closely linked to the issue of lawfare is the question of how international law reacts to new circumstances and developments like, for instance, the emergence of new actors (such as international terrorism) or technologies (e.g., the rise of autonomous weapon system or the possibility of ‘cyberwarfare’). More generally, this brings the question to the fore of how international law deals with uncertainty. The main issue in this regard is whether the existing concepts, procedures, principles and rules of international law do apply (e.g. by identifying rules of customary law, by subsuming under general principles of international law or by stretching existing legal concepts) or whether we need a new body of law. A good example in this regard is what has become known as cyberwarfare. In the

⁶³² Kennedy, 32.

⁶³³ Kennedy, 32; See also: ‘Most directly, the classic law established a privilege to kill on the battlefield; what would otherwise be murder was now legally privileged and legitimate’ Kennedy, 102.

⁶³⁴ Kennedy, *Of War and Law*, 106. For a recent plea to endow the military with more decision-making authority when it comes to discriminate the principle of military necessity in armed conflicts see, for example, Yishai Beer, ‘Humanity Considerations Cannot Reduce War’s Hazards Alone: Revitalizing the Concept of Military Necessity’, *European Journal of International Law* 26, no. 4 (2015): 801–28.

⁶³⁵ Kennedy, *Of War and Law*, 125; for a conceptual analysis of ‘lawfare’ see also Wouter Werner, ‘The Curious Career of Lawfare’, *Case Western Reserve Journal of International Law* 43 (2010): 61–72.

context of cyberwarfare, we can see how different groups of experts, in particular experts attached to the International Committee of the Red Cross and NATO, struggle over the question of how international law should deal with this rather new phenomenon. For instance, it is unclear which body of (international) law is applicable to cyberwarfare as, for instance, national and international criminal law, human rights law, *lex digitalis*, international economic law, international humanitarian law or a newly created international cyber law could qualify as relevant bodies.⁶³⁶ Connected to this, the object of study – cyberwarfare – is highly ambitious as it is not clear whether a *cyberwar* has ever happened, as there are different definitions of the term. As many observers identify cyberwarfare as the war of the *future* we can see that “issues of cyberspace are increasingly discussed in terms of a ‘preventive logic’”, i.e. a future-oriented logic which is usually not captured in traditional forms of (international) law.⁶³⁷ An example of how to deal with the uncertainties of cyberwarfare is the debate on the *Tallin Manual on the International Law Applicable to Cyber Warfare*.⁶³⁸ The manual was prepared on initiative of the NATO and basically elaborated by the US-American international lawyer Michael N. Schmitt.⁶³⁹ Here, two points are important to note. Firstly, by commissioning Schmitt (an *international lawyer*) and by scrutinizing the *international law* applicable, the findings of the report are to a certain extent predetermined. While, for example, expertise from other (non-international legal) fields like security studies would imagine cyberwarfare as a fundamental revolution of warfare, the manual subsumes it under *existing* categories of international law – and links it, e.g., to Article 2(4) of the UN Charter and past (and pre-digital) ICJ judgements on the use of force like the

⁶³⁶ Oliver Kessler and Wouter Werner, ‘Expertise, Uncertainty, and International Law: A Study of the Tallinn Manual on Cyberwarfare’, *Leiden Journal of International Law* 26, no. 4 (2013): 797.

⁶³⁷ Kessler and Werner, 801; the main task of international legal experts is thus also to transform uncertainty into risk in order to make it ‘managable’, Kessler and Werner, n. 4.

⁶³⁸ Michael N. Schmitt, ed., *Tallin Manual on the International Law Applicable to Cyber Warfare* (Cambridge: Cambridge University Press, 2013).

⁶³⁹ It is interesting to note that Schmitt started recently also to work on the topic of autonomous weapon systems, another technical innovation causing serious uncertainty in international law, Michael N. Schmitt and Jeffrey S. Thurnher, “‘Out of the Loop’: Autonomous Weapon Systems and the Law of Armed Conflict”, *Harvard National Security Journal* 4, no. 2 (2013): 231–81.

Nuclear Weapons opinion or the *Nicaragua* decision.⁶⁴⁰ This strategy excludes not only voices (non-legal but also legal voices from a domestic context) but by excluding these voices the problem is framed in a particular idiom with particular solutions (relying on state-centrism, solidifying the existing private/public distinction, etc.). Secondly, the manual claims the legitimacy and authority of its expertise in a specific way. As has been noted those claims rely on a specific constellation between the ‘personal’ and the ‘impersonal’ as, on the one hand, the personal expertise of a leading scholar like Schmitt is important, the manual has to draw, on the other hand, on impersonal legal sources in order to maintain the impression of non-arbitrariness.⁶⁴¹

What is interesting to note here is that experts and expertise seem not only to be all-around in (the various subfields of) contemporary international law but also that the concept of expertise is used (slightly) different in these various examples and, as a corollary, the way the ‘politics of expertise’ is problematized and theorized differs as well. It is one of the aims of this chapter to reconstruct and open up different avenues to study the ‘politics of expertise’ in international law (and beyond). Moreover, this chapter aims to link the previous discussions, which mainly focussed on scholarly projects in the intersection of IL and IR, to the reconstruction of jurisdictional projects outside the confines of academia (although, as we will see, for example, in Chapter 6, the boundary between academia and non-academia is never fully impermeable).

In order to do so, this chapter unfolds into three substantive sections. The next section (2.) provides a historical sketch of the study of experts and expertise in IL and IR. By doing so, I am able to show that this topic is not a new one but was part of larger academic debates and scholarly projects in the history of the two disciplines. Concretely, I will start with a debate on the role of expertise during the interwar years in the context of the League of Nations; move then to functionalist episodes in IR, namely David Mitrany’s work on technical agencies and the neo-functional literature on ‘epistemic communities’; and, finally, introduce Oscar

⁶⁴⁰ Lianne Boer and Wouter Werner, “‘It Could Probably Just as Well Be Otherwise’: Imageries of Cyberwar”, in *Risk and the Regulation of Uncertainty in International Law*, ed. Monika Ambrus, Rosemary Rayfuse, and Wouter Werner (Oxford: Oxford University Press, 2017), 48.

⁶⁴¹ Kessler and Werner, ‘Expertise, Uncertainty, and International Law’, 798, 802–803.

Schachter's idea of an 'invisible college of international lawyers', which still continues to be the prevailing IL-mainstream account on expertise. This historical sketch is followed (3.) by a reconstruction and comparison of important streams of the broader social theoretical literature on expertise. Starting with the Bell-Lyotard debate on the general consequences of the proliferation of knowledge for (post-)modern societies, it examines then how various authors (Abbott, Bourdieu, Latour, Jasanoff) frame the relationship of law, knowledge and expertise. This discussion aims not to be all-inclusive but rather to augment the conceptual apparatus of this thesis and anchor it in a couple of important literatures in social theory. The final substantive section (4.) turns then to recent contributions of critical scholars in IR and IL and how they problematize, conceptualise and theorize (the politics of) experts and expertise. Here, I link the literature on the 'politics of expertise' in international law to the scholarship on legal technicalities. I argue that the problematization of legal technicalities might serve to 'open the black box' of expert work in international law and that in particular the study of jurisdiction and jurisdictional projects as a legal technicalities is promising. This helps me to prepare my reconstruction of the politics of jurisdiction in international law and politics in the context of 'humanity's law' in the final three substantive chapters of this thesis.

2. Expertise in International Politics and Law: A historical sketch

Although we can find, as I will reconstruct later in this chapter, today a burgeoning literature on experts and expertise in critical scholarship in both IL and IR, it is usually little noticed however that this topic is hardly new for both fields. If we take the example of my earlier discussion (Chapter 2) of the contributions of the Chicago-based scholars Frederick Schuman, Harold Lasswell and Quincy Wright during the interwar years, all of these scholars used a rather instrumental concept of international law and (implicitly) advocated a project of interdisciplinarity between IR and IL, which invokes an external third as both IR and IL should become a 'social science' or 'policy science'. Thus to be 'scientific', though understood in a specific way, should be the aim of all scholarly work. Closely linked to such a desire to become more scientific was, already during the interwar years,

the belief in the problem-solving capacities of experts. Indeed, as Jan-Stefan Fritz notes, during the interwar years the “terms *scientific* and *expert* were taken synonymously” as authors of this period believed that ‘scientific expertise’ would help to eliminate war and, consequently, establish peace.⁶⁴² As reconstructed in Chapter 2, it was this hope to eliminate war and the idea that IR could provide the knowledge to do so, which was the main theme among ‘internationalists’ during the *Interbellum* (most explicitly stated in the work of Quincy Wright).

Thus, what we see here are early attempts to conceptualise expertise within the emerging academic discipline of IR. I will open this historical sketch by outlining debates about the role and rule of experts within early IR and embedded this discussion in broader social and political debates of this time (2.1); turn then different streams of functionalism within IR and how they conceptualise expertise (2.2); and finally address Schachter’s ‘invisible college of international lawyers’ (2.3).

2.1 ‘Ask Mr. League Expert’: Experts, Democracy and the League of Nations

If we turn first to the emerging academic field of IR, and here particularly to the 1920s and 1930s, the interest in the capacity of expertise did not emerge out of thin air, as IR could connect to an already existing more general discourse on expertise. However, this general discourse did not address themes of international politics but rather dealt with issues of domestic democratic government (mainly in the United States). Nevertheless, it is worth having a quick look at this literature, as it should frame debates in IR and in particular offer an important source of inspiration for internationalist figures such as Lasswell and Wright. Without doubt, Walter Lippmann’s work stands out in this context. Among Lippmann’s numerous writings it was the 1922-monograph *Public Opinion*, which had the biggest impact when it comes to address the role of experts and their relevance for democratic

⁶⁴² Jan-Stefan Fritz, ‘Internationalism and the Promise of Science’, in *Imperialism and Internationalism in the Discipline of International Relations*, ed. David Long and Brian C. Schmidt (Albany: State University of New York Press, 2005), 143 (emphases in the original).

government.⁶⁴³ Lippmann argues in *Public Opinion* that political decision makers should neither rely on the will of the masses nor follow the press but instead base their decisions on the advices of independent experts. For Lippmann it is particularly the advice of political scientists that should inform governmental decision makers as this kind of expertise would facilitate to understand and govern the complexities of modernity as it would guarantee that the best available decision is always taken. In addition, experts should not restrict their work to deliver practical knowledge to political decision makers only but also help to inform and steer public opinion. Typical for Lippmann's rather conservative-elitist and – one could say – Platonic (not by chance, the book begins with a quote from the cave allegory of Plato's *Republic*) conception of democracy are passages like, for example, the following one:

"I argue that representative government, either in what is ordinarily called politics, or in industry, cannot be work successfully, no matter what the basis of election, unless there is an independent expert organization for making the unseen facts intelligible to those who have to take the decisions [...]. My conclusion is that public opinion must be organized for the press if they are to be sound, and not by the press as it is the case today. This organization I conceive to be in the first instance the task of a political science that has found its proper place as formulator, in advance of real decision, instead of apologist, critic, or reporter of the decisions have been made. I try to indicate that the perplexities of government and industry are conspiring to give political science this enormous opportunity to enrich itself and to serve the public".⁶⁴⁴

Moreover, Lippmann observes – and this should become a recurring pattern in since then in various literatures on expertise – that experts do not operate in the front row but rather pull strings in the background. As Lippmann describes it, the

⁶⁴³ Walter Lippmann, *Public Opinion* (New York: Harcourt, Brace and Company, 1922). See also the discussion in Craufurd D. Goodwin, 'The Promise of Expertise: Walter Lippmann and the Policy Sciences', *Policy Sciences* 28, no. 4 (1995): 317–45.

⁶⁴⁴ Lippmann, *Public Opinion*, 31–32.

expert “finds and formulates the facts for the man of action”;⁶⁴⁵ the expert is the “mediator among representatives” and the “mirror and measure of administration”;⁶⁴⁶ and the expert must permanently “translate, simplify [and] generalize”.⁶⁴⁷ However, things could get difficult, as it is not always clear to identify who, as Lippmann formulates, “the most expert” is among those claiming expertise in a given case.⁶⁴⁸ As we will see below, the observation of a struggle between different experts over discursive hegemony on a specific topic is one of the major themes for contemporary critical approaches to expertise.⁶⁴⁹

If we come back to the ‘international’ and the emerging discipline of IR, it were not only, as already mentioned, the Chicago-based authors who were concerned with the role of experts and expertise during the interwar years.⁶⁵⁰ A prominent example is Raymond B. Fosdick, the long-standing president of the Rockefeller Foundation, who enthusiastically welcomed in the mid-1920s the work of expert groups and committees within the League of Nations. According to Fosdick, the increasing complexities of world politics made the integration of expert work in the working processes of the League indispensable. “International life has reached a stage where its technical projects can be met only by technical scientific study”.⁶⁵¹ From security questions to labour rights or from the protection and settlement of refugees to health policy, it is the League that provided for almost every political project of international scale valuable expertise. Here,

⁶⁴⁵ Lippmann, 375.

⁶⁴⁶ Lippmann, 375.

⁶⁴⁷ Lippmann, 381.

⁶⁴⁸ Lippmann, 223.

⁶⁴⁹ Lippmann further strengthened this point in a later monograph: Walter Lippmann, *The Phantom Public* (New Brunswick: Transaction Publishers, 1925). Moreover, John Dewey published a direct and powerful critique of Lippmann’s framework of expert rule. In opposition to Lippmann, Dewey tries to reevaluate the role of the average democratic citizen and, as a consequence, to diminish the power of experts. See John Dewey, *The Public and Its Problems* (New York: Henry Holt, 1927).

⁶⁵⁰ For a broader overview on this topic see also Katharina Rietzler, ‘Experts for Peace: Structures and Motivations of Philanthropic Internationalism in the United States and Europe’, in *Internationalism Reconfigured: Transnational Ideas and Movements between the World War*, ed. Daniel Laqua (London: I.B. Tauris, 2011), 45–65.

⁶⁵¹ Raymond B. Fosdick, *An Expert Approach to International Relations: The League of Nations as an International Clearing House* (New York: League of Nations Non-partisan Association, 1924), 9. This is so as, according to Fosdick, we witness a ‘breaking down of space and distance, this tremendous development of communication and transit, has revolutionized the work of the world. Industry can no longer be kept within national boundary lines’. Consequently, the time is ‘long past when any nation can insulate itself from the economic security or chaos of the rest of the world’, Raymond B. Fosdick, ‘Public Welfare in Relation to International Problems’, *The Annals of the American Academy of Political and Social Science* 105 (1923): 18.

experts solve problems as they compile blueprints, coordinate between different international bodies and associations or assemble and deliver information – or, as Fosdick writes, if you have any question: “Ask Mr. League Expert”.⁶⁵² Consequently, the League operates, as Fosdick puts it, “as a clearing-house for international difficulties”.⁶⁵³ Fosdick lists two reasons, which make the work of experts at the League so successful. Firstly, the League is able to attract the most qualified specialists from all over the world and brings them together in committees where knowledge and not nationality counts.⁶⁵⁴ Secondly, over the years the form of problem-solving itself has transformed (and improved) as “political manoeuvring” was substituted by “expert advice”.⁶⁵⁵ Writing in 1924, Fosdick claims that the world has with the experts of the League of Nations “at its command the services of a high-specialized machinery adapted to an international emergency”.⁶⁵⁶

In a similar vein, for example, Alfred Zimmern foregrounded in the 1930s the benefits of committees and other expert groups in the context of the League of Nations.⁶⁵⁷ As Zimmern frames it, experts deal with “applied science” and form a distinct “group which has put its special knowledge to practical use and been enabled to profit by experience”.⁶⁵⁸ For Zimmern it is important to stress that, with regard to the work of experts in the context of the League, the “‘glorious invention’ here consists in the discovery that Committees of Experts function more satisfactorily on an international than on a national basis”.⁶⁵⁹ Successful examples are, as Zimmern lists, the negotiations and drafting of the Dawes and Young Plan (settling the open conflict regarding the reparation payments of Germany after the

⁶⁵² Fosdick, *An Expert Approach to International Relations*, 11. More precisely, the League of Nations solved the international cooperation problem: ‘Whatever we may think of the League [...] it has become a convenient agency for handling situations relating to public welfare which no nation acting alone can meet’, Fosdick, ‘Public Welfare in Relation to International Problems’, 19.

⁶⁵³ Fosdick, *An Expert Approach to International Relations*, 7.

⁶⁵⁴ In Fosdick writings are endless enumerations like the following: ‘The technical committee on communications and transit includes men like Bignami, the Italian engineer, Lankas, the director of railways in Czecho-Slovakia, and Tsang-Ou, the director of the Chinese state railways’, Fosdick, 9.

⁶⁵⁵ Fosdick, 7.

⁶⁵⁶ Fosdick, 7. A decade later, Fosdick should claim that the re-politicization and the shift away from expert knowledge have caused the crisis of the League and world politics. Cf. Raymond B. Fosdick, ‘Stabilization of Peace Through the League of Nations’, *Proceedings of the Academy of Political Science* 16, no. 2 (1935): 72–81.

⁶⁵⁷ See in particular Alfred Zimmern, ‘Democracy and the Expert’, *The Political Quarterly* 1, no. 1 (1930): 7–25; and Alfred Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (London: Macmillan, 1936), 318–324.

⁶⁵⁸ Zimmern, ‘Democracy and the Expert’, 159.

⁶⁵⁹ Zimmern, 15.

First World War) but also the establishment of the Bank of International Settlements or in the work of the Financial Committee of the League of Nations.⁶⁶⁰ The reason why the work of experts in the context of the League is so efficient was a “common spirit” of all professionals, which are involved.⁶⁶¹ Yet, in opposition to Lippmann or Fosdick, Zimmern acknowledges that the rule of experts is only the second best form of rule, when it is evaluated from the point of view of democracy. This is so, as the best option would be a worldwide improvement in the general educational level – an improvement, of which the proliferation of experts can be interpreted as its spearhead: if the worldwide educational level would improve, this would in the end make all citizen experts and would give them thereby the necessary competence to take self-conscious decisions in the complex settings of an independent world.

2.2 From Functionalism to Epistemic Communities

The various forms of functionalism present a second tradition of scholarship on expertise within IR. Until today, the different strands of functionalism are prominent when it comes to conceptualise expertise in IR mainstream accounts.⁶⁶² The ‘natural’ starting point in this regard is certainly the work of David Mitrany and his proposal for a ‘working peace system’.⁶⁶³ This text initiated the functionalist tradition in the discipline. Writing in 1943, for Mitrany the vantage point was not – as for Fosdick or Zimmern – a (still) successful League of Nations but its failure. Yet, in contrast to the early realists, for Mitrany this did not signify to take the rather ‘pessimistic’ route by denying the impact of international institutions and reducing them to epiphenomena of the international struggle for power. Instead, Mitrany argued that “international activities and agencies” are

⁶⁶⁰ Zimmern, 15.

⁶⁶¹ Zimmern, *The League of Nations and the Rule of Law*, 321.

⁶⁶² The relevance of the functionalist literature for a traditional understanding of expertise is also highlighted by Christian Bueger, ‘From Expert Communities to Epistemic Arrangements: Situating Expertise in International Relations’, in *The Global Politics of Science and Technology*, ed. Maximilian Mayer, Mariana Carpes, and Ruth Knoblich, vol. 1 (Berlin: Springer, 2014), 39–54; and Wouter G. Werner, ‘The Politics of Expertise: Applying Paradoxes of Scientific Expertise to International Law’, in *The Role of ‘Experts’ in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?*, ed. Monika Ambrus et al. (Cambridge: Cambridge University Press, 2014), 58.

⁶⁶³ David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (London: The Royal Institute of International Affairs, 1943).

capable to guarantee the peaceful settlement of conflicts if they are part of a 'working peace system' on a global scale.⁶⁶⁴ In order to create the institutional arrangement of such a 'working peace system', it is important, according to Mitrany, to understand the reasons for the failure of the League. For Mitrany the League failed because it was a "political federation", which was built – through its Covenant – in a top-down manner. Mitrany observes in 1943 that "as things are the political way is too ambitious".⁶⁶⁵ The political way is too ambitious as the global political landscape is at this time too fragmented. For the same reason, larger international federations, based on ideology (may it be Democracy, Fascism or Communism) or territoriality (like the British Empire), are bound to fail. Instead, Mitrany's proposal builds on the idea of functional activities and agencies. These activities and agencies should not be bound by territory or ideology but rather by specific issue areas.⁶⁶⁶ Although these associations might operate on a worldwide scale, they might facilitate cooperation as they evolve from 'bottom up' and thus in a more 'natural', 'organic' and stable way. Furthermore, these functional arrangements should not be dominated by politics and diplomats but by technical considerations and technical experts. Mitrany argues that experience from the past shows in "many fields arrangements between states have been settled and developed directly in conferences attended by technical experts representing their respective departments, without passing through the complicating network of political and diplomatic censors".⁶⁶⁷ In other words, Mitrany (as, e.g., Fosdick and Zimmern before) strongly differentiates between expertise and politics. Moreover, the former is capable to 'tame' the latter. Knowledge and power are thus separated.

If we turn now to more recent research, the idea of functional experts has been translated into the broader research project on 'epistemic communities'. The concept of epistemic communities marries functionalism with "soft

⁶⁶⁴ Mitrany, 6. Although Hans Morgenthau also referred to 'functionalism' in his famous 1940 article (see my discussion in Chapter 2), both Morgenthau and Mitrany use the term in different ways. While, as we will see, Mitrany puts his hope in the exclusion of politics through technical conflict resolution mechanism, Morgenthau took the exact opposed direction, as for him the solution lies in the substitution of (mainly legal) technical mechanism through politics.

⁶⁶⁵ Mitrany, 54.

⁶⁶⁶ This is, of course, an early articulation of (and claim for) a move from territorial (segmentation) to functional differentiation.

⁶⁶⁷ Mitrany, *A Working Peace System*, 27.

constructivism”,⁶⁶⁸ has its origins in the regime literature,⁶⁶⁹ follows Robert Keohane’s call for a “reflective research program”⁶⁷⁰ and, as Mai’a K. Davis Cross suggests, can be linked to the more general literature on “transnational global governance” through networks.⁶⁷¹ Examples of such networks are Anne-Marie Slaughter’s ‘transgovernmental networks’ of judges, Margaret Keck and Kathryn Sikkink’s ‘transnational advocacy networks’ or Emanuel Adler’s ‘communities of practice’.⁶⁷² All of these projects focus on questions of *agency* and how causal and normative *ideas* spread and guide collective behaviour.

The concept of epistemic communities has been popularized in IR in the same way as it has been with ‘regimes’ and ‘legalization’, namely through a special issue in the discipline’s leading mainstream journal *International Organization*. The special issue was published in 1992 and Peter M. Haas provided in its framing article a general definition of epistemic communities. According to this definition an “epistemic community is a network with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area”.⁶⁷³ Haas describes epistemic communities also as “knowledge-based networks”.⁶⁷⁴ In this context Haas advances three important arguments. Firstly, Haas introduces a ‘thicker’ notion of community. In order to constitute an epistemic community, its members could have different disciplinary backgrounds but must have, what Haas calls, “a shared set of normative and principled beliefs”, “shared causal beliefs”, “shared notions of validity” and “a

⁶⁶⁸ Peter M. Haas, ‘Ideas, Experts and Governance’, in *The Role of ‘Experts’ in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?*, ed. Monika Ambros et al. (Cambridge: Cambridge University Press, 2014), 23.

⁶⁶⁹ For an early use of the concept of ‘epistemic communities’ see: John Gerard Ruggie, ‘International Responses to Technology: Concepts and Trends’, *International Organization* 29, no. 3 (1975): 557–83. See also my discussion of the literature on international regimes in Chapter 2.

⁶⁷⁰ See already the title of Emanuel Adler and Peter M. Haas, ‘Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program’, *International Organization* 46, no. 1 (1992): 367–90.

⁶⁷¹ Mai’a K. Davis Cross, ‘Rethinking Epistemic Communities Twenty Years Later’, *Review of International Studies* 39, no. 1 (2013): 139.

⁶⁷² I introduced these ideas already in Chapter 2. See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); and Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (London: Routledge, 2005).

⁶⁷³ Peter M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, *International Organization* 46, no. 1 (1992): 3.

⁶⁷⁴ Haas, 2.

common policy enterprise”.⁶⁷⁵ This means also that “expertise needs to be organized and self-organized in terms of epistemic communities”.⁶⁷⁶ Secondly, Haas delimits his account of epistemic communities in one important point from Mitrany’s earlier version of functionalism. As we have seen, Mitrany’s idea was to solve political problems through technical innovation – or in other words: for him expertise should trump politics. Expertise and politics are two distinct, sharply separated realms. In Haas’ neo-functionalist framework, however, experts are directly linked to political projects: “Especially in cases in which scientific evidence is ambiguous and the experts themselves are split into contending factions, issues have tended to be resolved less on their technical merits than on their political ones”.⁶⁷⁷ Thus, expertise and politics might intersect and experts themselves might operate as political actors or be instrumentalised for political purposes. Consequently, expertise cannot trump politics. In more empirical terms this hypothesis has been examined and tested first and foremost in the field of environmental policy and, here, in studies of contending approaches to the management of the stratospheric ozone layer.⁶⁷⁸ Thirdly, the literature on epistemic communities engages in some kind of a division of labour with other agency-related approaches – all of them linked loosely to moderate constructivism. In order to separate epistemic communities from other approaches, Haas distinguishes between brute, hybrid and social facts – a distinction that goes in part back to John R. Searle.⁶⁷⁹ While epistemic communities and their respective experts mainly deal with brute and hybrid facts (hybrid facts concern, e.g., ecology), social facts remain the “domain of advocates and norm entrepreneurs”.⁶⁸⁰ This means also that lawyers and other legal experts do not constitute an epistemic community by their own. Nevertheless, they may be able to mobilise expertise from epistemic communities as they may rely on their work. In other words, the literature on epistemic communities treats only certain knowledge practices as expertise, namely those related to brute and hybrid facts

⁶⁷⁵ Haas, 3.

⁶⁷⁶ Haas, ‘Ideas, Experts and Governance’, 21.

⁶⁷⁷ Haas, ‘Introduction’, 11.

⁶⁷⁸ Cf. Peter M. Haas, ‘Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone’, *International Organization* 46, no. 1 (1992): 187–224.

⁶⁷⁹ Haas, ‘Ideas, Experts and Governance’, 25–29. The distinction of brute and social (or institutional) facts is originally Searle’s, see John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995).

⁶⁸⁰ Haas, ‘Ideas, Experts and Governance’, 28.

(or the natural sciences broadly conceived), and still distinguishes to a certain extent between politics and expertise: experts might operate as political actors or their knowledge itself might be instrumentalized for political purposes, yet the realm where we can ‘find’ expertise remains pre-given.

2.3 The ‘invisible college of international lawyers’

That lawyers constitute a distinct group of experts is, however, the core assumption of Oscar Schachter’s idea of an ‘invisible college of international lawyers’.⁶⁸¹ The ‘invisible college’ is certainly the dominant contribution when it comes to conceptualise expertise in IL from a traditional (in this case: policy-oriented) perspective.⁶⁸² Schachter starts with the observation that the professional group of international lawyers may appear *prima facie* as highly disintegrated because, on the hand, international lawyers work both as scholars as well as officials and, on the hand, they are spread all over the world. However, Schachter scrutinizes this observation and argues that international lawyers, as a “professional community”, represent “a kind of invisible college dedicated to a common intellectual enterprise”.⁶⁸³ According to Schachter, there are four elements that constitute the ‘common intellectual enterprise’ of the ‘invisible college’. First, even though the work of international lawyers is not value-free (as it is, for Schachter, research in the case of the natural sciences) and even though international lawyers may be biased when they work as officials for governments, their general activity is still to be considered as *objective*. Consequently, it is wrong to insist in the “indeterminacy and relativism” of international law. This is so as always when lawyers act independently, i.e. free from “political interests”, and when they are competent, their interpretations should be unbiased, determinate and free of relativism.⁶⁸⁴ Second, international lawyers are “generalists”. This

⁶⁸¹ Oscar Schachter, ‘The Invisible College of International Lawyers’, *Northwestern University Law Review* 72, no. 2 (1977): 217–26.

⁶⁸² For an accessible introduction to Schachter’s policy-oriented perspective, see for example his short piece: Oscar Schachter, ‘The Place of Policy in International Law’, *Georgia Journal of International and Comparative Law* 2, no. 2 (1972): 5–14; and the interview in Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Oxford: Hart, 2011).

⁶⁸³ Schachter, ‘The Invisible College of International Lawyers’, 217.

⁶⁸⁴ Schachter, 220. Schachter compares the possibility to produce legal objectivity by comparing the work of the lawyer with that of the historian. While historians might be biased by their political

means that the field of international law has been able to “avoid compartmentalization” because international lawyers, even if they work in different fields, are still able to communicate with each other without greater difficulties across these fields. According to Schachter, a specialization and division of labour, as we have witnessed it in the natural and social sciences, is in the field of international law “not likely in the near future, nor is it desirable”.⁶⁸⁵ Third, the fact that international lawyers are generalists predestines them to operate as orchestrators of larger projects among the different social and natural sciences (and their respective expertises) when it comes to solve international problems. This is the case in particular when not only the formulation and interpretation of current law (*lex lata*) is at stake but when international lawyers take over a legislative role in formulating what the law should be (*de lege ferenda*). If international lawyers fulfil such a function, their work is always political as well.⁶⁸⁶ However, for Schachter this does not constitute a problem as law and politics are always intertwined – and as an a-political international law (as it can be found in the work of international legal positivists) would make international law “less and less significant” and turn international lawyers into “a ‘mouthpiece or notary’, incapable of dealing with the real issues involved in developing and applying law”.⁶⁸⁷

In this context, Schachter considers a figure such as the former UN Secretary-General Dag Hammarskjöld as the ideal type of an international legal expert as Hammarskjöld was completely aware of the need to use law in a rather flexible way but, simultaneously, used the flexibility of international law to achieve the principles (or ‘policy’) of the UN Charter.⁶⁸⁸ To rely on the Charter is important for

preferences, for Schachter there are still some historical ‘facts’ that cannot be disputed. Similarly, in international law there are undisputable facts. See Schachter, ‘The Place of Policy in International Law’, 13–14.

⁶⁸⁵ Schachter, ‘The Invisible College of International Lawyers’, 221–223.

⁶⁸⁶ Schachter, 223–226.

⁶⁸⁷ Schachter, ‘The Place of Policy in International Law’, 14.

⁶⁸⁸ As Schachter puts it: ‘Hammarskjöld’s reliance on principles and legal concepts may appear to be at variance with the flexibility and adroitness that characterized much of his political activity; yet on reflection it will be seen that these apparently antithetical approaches were both essential aspects of a skilled technique for dealing with the specific problems which he faced. It is a technique that should be of special interest for the international lawyer, for it demonstrated that legal norms can be applied to novel situations without rigidity or blind conformity to precedent’, Oscar Schachter, ‘Dag Hammarskjöld and the Relation of Law to Politics’, *American Journal of International Law* 56, no. 1 (1962): 3. For a reconstruction of the impact of Hammarskjöld on the UN,

Schachter as the “Charter and international law embod[y] the deeply-held values of the great majority of mankind and therefore constitute[e] the moral, as well as legal, imperative of international life”.⁶⁸⁹ Finally, and also linked to this last point, Schachter highlights that the invisible college is tied together by a common normative view, “*la conscience juridique*”, which manifests itself in the idea that social and political problems should be solved in an internationalist and progressive way.⁶⁹⁰ By relying on this, Schachter hopes to be able to “develop a truly international legal process which takes full account of the aims and common interests of mankind”.⁶⁹¹

To summarize this section: So far I have reconstructed the history of the notion of expertise in international thought and concentrated for this purpose on three broader discourses. Firstly, I traced back an early discourse on expertise, which emerged after the Great War in the domestic context (with Walter Lippmann as main figure). This interest in the rule and role of experts and expertise should also inform the literature on international organizations in the interwar years – as it should support claims to turn the League of Nations into a federation of various technical expert committees, which enables the League then to turn into an instrument to eliminate war. Secondly, this section reviewed two streams of functionalism in IR. On the one hand, David Mitrany’s early functionalist attempt to explain the failure of the League system by arguing that it was ‘over-politicized’. Consequently, in order to transform the international into a ‘working peace system’ it is for Mitrany necessary to organize it around an a-political system of technical agencies and experts. On the other hand, neo-functionalist contributions introduced the concept of ‘epistemic communities’ in order to link the early functionalists emphasis on expertise with the moderate constructivist literature of the 1990s. One important difference between the two functionalist accounts concerns the fact that the literature on ‘epistemic communities’ shifts the boundary between politics and expertise as it recognises that experts engage in – or might be instrumentalized – for political project. Nevertheless, as I pointed out,

in particular the establishment of practices of ‘international executive action’, see also Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), chap. 2.

⁶⁸⁹ Schachter, ‘Dag Hammarskjöld and the Relation of Law to Politics’, 3.

⁶⁹⁰ Schachter, ‘The Invisible College of International Lawyers’, 226.

⁶⁹¹ Schachter, ‘The Place of Policy in International Law’, 14 (emphasis in the original).

the assumption that there exists a pre-given space of neutral expertise (to be found in scientific endeavours concerned with brute and hybrid facts) remains unquestioned. Thirdly, I turned to the ‘invisible college of international lawyers’ of Oscar Schachter, which is until today the dominant traditional approach on expertise in IL. In Schachter’s policy-oriented approach expertise and politics are in general intertwined when it comes to international law. However, this is not problematic as the international legal profession forms an ‘invisible college’ that ‘takes full account of the aims and common interests of mankind’.

These different ways to conceptualise expertise in traditional IR and IL links also to my earlier discussion in Chapter 2 of the various interdisciplinary projects between IR and IL and their related imaginaries of the ‘international’. In a similar ways *it is possible to link the different conceptualisations of expertise in traditional international thought to these conceptualisations of the ‘international’*. While the *Interbellum* discourse on expertise is embedded in the same worldview as the work of the Chicago-based authors Schuman, Wright and Lasswell – and hence frames the ‘international’ in terms of ‘international organisation’ –, the (neo-)functionalist literature as well as Schachter’s policy-driven analysis of the ‘invisible college’ represent, in the case of Mitrany and Schachter early, manifestations of conceptualising the international in terms of ‘global governance’ – a web of expertise in, around and beyond loose institutional settings. The last section of this chapter will turn to approach on expertise, which can be linked to an image of the ‘international’ as ‘world society’. Although coming from different perspectives and traditions of thought, these approaches, as we will see, problematize the politics of expertise in international law by pointing out how experts are part and parcel of world-making activities and political projects on a global scale. However, in order to prepare this discussion, let me first briefly introduce in the next section how different literatures in social theory conceptualise experts and expertise.

3. Social Theory and Legal Expertise

Although we can trace, as we have seen in the previous section, a social theoretical tradition on experts and expertise at least back to the 1920s (with Walter Lippmann being the most prominent example), it was only from the 1970s onwards when the interest in the role of experts further substantiated as several authors started to describe Western societies as late-capitalist or post-modern. The vantage point here were major societal transformations, which were addressed in terms of a diagnosis of 'legitimation problems' or a 'legitimacy crisis' of the project of Western modernity and its auxiliary developments of democracy and ('late') capitalism.⁶⁹² In this section, I will, first, address contributions, which describe the 'legitimacy crisis' as a crisis of how knowledge and society are linked (3.1), and turn then to three recent efforts, which explicitly link law and expertise. These are the attempt to move from a sociology of professions to a sociology of expertise (Andrew Abbott) (3.2), Pierre Bourdieu's work on the judicial field (3.3) and, finally, research in the broader context of science and technology studies (STS) and/or actor-network theory (ANT) (Bruno Latour, Sheila Jasanoff) (3.4).

3.1 Knowledge and Society

The work of the American sociologist Daniel Bell is a good starting point effort to reconstruct different social theoretical accounts on experts and expertise.⁶⁹³ Bell is a good starting point as he was – more than forty years ago – among the first to diagnose fundamental shifts within the social, political and economic structure of the most advanced countries on both sides of the Iron Curtain. In his seminal study *The Coming of the Post-Industrial Society*, published originally in 1973, Bell argues that these countries are processing a deep transformation from industrial to post-industrial societies.⁶⁹⁴ While in industrial societies the majority of workers produces tangible goods, post-industrial societies are in turn characterized by the rise of knowledge-based tasks. More concretely, it is for Bell above all "theoretical

⁶⁹² Cf. Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* (Frankfurt am Main: Suhrkamp, 1973).

⁶⁹³ Werner, 'The Politics of Expertise', 45.

⁶⁹⁴ Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting*, 3rd ed. (New York: Basic Books, 1999).

knowledge”, which has become the “matrix of innovation”.⁶⁹⁵ This transformation is in its extent radical and profound. Nevertheless, for Bell, this shift from industrial to post-industrial societies occurs within the confines of modernity – next step of the project of modernity. Post-industrial societies are still modern as their transformation is a progressive one in the end. In post-industrial societies knowledge is not only the main societal “resource” but “universities” and “research institutes” become the central social institutions, “education” the central tool to gain societal “access”, “scientists” and “research men” the “dominant figures” and, finally, a “balance of technical-political forces” the “means of power”.⁶⁹⁶ As Bell puts it, as a “*stratum*, scientists, or more widely the technical intelligentsia, now have to be taken into account in the political process”.⁶⁹⁷ One result of this development is that in areas where politics had previously dominated the technical (understood as the “rational”), the relationship is now turning around and the “politician, and the political public, will have increasingly versed in the technical character of policy”.⁶⁹⁸ More generally, Bell’s diagnosis should become an important reference for neoconservative forces and their attempt to (re)gain discursive hegemony in the 1970s and 1980s, in particular because Bell saw his own “role as replacing ‘ideological’ discourse based on unelected political categories and passionate instincts with ‘responsible’ technocratic knowledge drawing from the social sciences”.⁶⁹⁹ Once again, technocratic knowledge and expertise is understood as neutral and even a de-politicising force.

Since the publication of Bell’s *The Coming of the Post-Industrial Society*, the conclusion that many societies have entered a new era where knowledge dominates society has become a commonplace and guiding theme for many social theorists.⁷⁰⁰ A good example in this regard is Jean-François Lyotard’s seminal essay *The Postmodern Condition*.⁷⁰¹ The piece was originally published in 1979, six years

⁶⁹⁵ Bell, 344.

⁶⁹⁶ Bell, 359.

⁶⁹⁷ Bell, 359.

⁶⁹⁸ Bell, 365 (emphasis in the original).

⁶⁹⁹ Jacob Hamburger and Daniel Steinmetz-Jenkins, ‘Why Did Neoconservatives Join Forces with Neoliberals? Irving Kristol from Critic to Ally of Free-Market Economics’, *Global Intellectual History*, forthcoming.

⁷⁰⁰ Wouter Werner, for instance, lists in this context also the work of Ulrich Beck on ‘risk-society’ and of Nico Stehr on ‘knowledge societies’, see Werner, ‘The Politics of Expertise’, 45–52.

⁷⁰¹ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984).

after *The Coming of the Post-Industrial Society*, and is intended as a direct answer to Bell's monograph. Lyotard agrees, on the one hand, with Bell's main finding, namely that knowledge and knowledge production plays an increasingly important role in more 'advanced' societies but is, on the other hand, more sceptical about the consequences of this development. While Bell, as we have seen, emphasised the rationality and objectivity of knowledge – and was thus able to locate the post-industrial society within the project of modernity –, Lyotard, on the other hand, stresses that knowledge is highly fragile. To substantiate this claim, Lyotard provides us with the example of the great meta-narratives of modernity, such as the narratives of Enlightenment, Marxism, Universality, Progress and Emancipation. These narratives have either seen their end already or are at least in an existential crisis. The proliferation of knowledge by means of new information and communication technologies did neither increase the homogeneity of knowledge nor did it solidify its foundations. Rather, the opposite seems to be the case as many societies are confronted now with "postmodern knowledge" consisting of a "heterogeneity of language games", i.e., with small and 'local' narratives in struggle over discursive hegemony.⁷⁰² Not even science remains untouched of this shift and has become unable to stabilize knowledge and meaning. Thus, paradoxically, more knowledge increases the uncertainty of knowledge. As Lyotard writes,

"[p]ostmodern science – by concerning itself with such things as undecidables, the limits of precise control, conflicts characterized by incomplete information, '*fracta*', catastrophes, and pragmatic paradoxes – is theorizing its own evolution as discontinuous, catastrophic, nonrectifiable, and paradoxical. It is changing the meaning of the word

⁷⁰² Lyotard, xxv. The idea of describing the world in terms of 'language games' goes, of course, back to Wittgenstein. Lyotard was influenced by Wittgenstein – or as he put it he was writing 'after' Wittgenstein. Reflecting on the notion of 'language games', Lyotard states: 'The examination of language games, just like the critique of the faculties, identifies and reinforces the separation of language from itself. There is no unity to language; there are islands of language, each of them ruled by a different regime, untranslatable into the others'. He substantiates the claim of the 'untranslatability' of language games as follows: 'Games do not have many common traits among them; a move made in bridge cannot be "translated" into a move made in tennis. The same goes for phrases, which are moves in language games: one does not "translate" a mathematical proof into a narration. Translation is itself a language game', Jean-François Lyotard, 'Wittgenstein "After"', in *Political Writings*, ed. Jean-François Lyotard (Minneapolis: University of Minnesota Press, 1993), 20, 21. Put differently, to speak of the postmodern condition means to acknowledge the 'untranslatability' of different 'language games' into each other.

knowledge, while expressing how such a change can take place. It is producing not the known, but the unknown. And it suggests a model of legitimation that has nothing to do with maximized performance, but has as its basis difference understood as paralogy”.⁷⁰³

For Lyotard, scientists should thus not attempt to reach agreements (homology) but do the opposite and emphasise the instability of knowledge or, for example, point to the problematic assumption of a ‘normal science’ (paralogy).⁷⁰⁴ As science and technology – and this is the main difference between Bell and Lyotard – is not able to coordinate our fragmented knowledge anymore and, hence, to guarantee progress, the project of modernity has come to an end: the post-modern condition has become the dominant condition.

As a consequence, Lyotard challenges another aspect of the progressive narrative of modernity, namely that those who have more knowledge have more authority. As Lyotard points out,

“[p]ostmodern knowledge is not simply a tool of the authorities; it refines our sensitivity to differences and reinforces our ability to tolerate the incommensurable. *Its principle is not the experts homology, but the inventor’s paralogy*”.⁷⁰⁵

More generally, Lyotard’s main contribution – and this will be a recurrent *topos* in the remainder of this chapter – was to point out that knowledge – the anchor of the project of modernity – has become highly fragmented: a turn *from knowledge to knowledges*. Now, different societal forces can instrumentalise different knowledges and expertises in their attempts to dominate society by monopolising the power to interpret. These forces are the more successful the better they ‘link phrases’. In political terms, Lyotard’s analysis points in the exact opposed direction as Bell’s, as Lyotard in (post-)Marxist terms concludes that it is “capital, which is a

⁷⁰³ Lyotard, *The Postmodern Condition*, 60.

⁷⁰⁴ For philosophy this means: ‘Philosophy is a discourse that has as its rule the search for its rule (and that of other discourses), a discourse in which phrases thus try themselves out without rules and link themselves guided only by amazement at the fact that everything has not been said, that a new phrase occurs, that it is not the case that nothing happens’, Lyotard, ‘Wittgenstein “After”’, 21.

⁷⁰⁵ Lyotard, *The Postmodern Condition*, xxv (emphasis added).

regime of linking phrases, far more supple and far more ‘inhuman’ (oppressive, if you will) than any political or social regime. Wages, profits, funds for payment and credit, investment, growth and recession, the money market: it would indeed be interesting to analyze these objects as moves or rules proceeding from various language games. And what if capital were a multiform way of dominating time, of linking?”⁷⁰⁶

3.2 From a Sociology of Professions to a Sociology of Expertise (Abbott)

If we turn now to more recent literatures – literatures that explicitly link expertise and law –, at least three developments in social theory that stand out. *First*, the traditional sociology of professions is transforming increasingly into a sociology of expertise.⁷⁰⁷ The main reference in this context is the sociology of Andrew Abbott, which stands in the tradition of symbolic interactionism.⁷⁰⁸ The shift from professions to expertise is already visible in the title and subtitle of Abbott’s central study on the subject matter, the monograph *The System of Professions: An Essay on the Division of Expert Labor*.⁷⁰⁹ For Abbott, the link between expertise and professionalism is established when expertise resides in *people*;⁷¹⁰ something which resonates also with David Kennedy’s suggestion to conceptualise experts as ‘people with projects’.⁷¹¹ Moreover, while traditional accounts in the sociology of professions were either looking at one profession at a time or explained the rise (and fall) of professions through internal processes of professionalization (or deprofessionalization), Abbott suggests to study professions instead by focussing

⁷⁰⁶ Lyotard, ‘Wittgenstein “After”’, 21–22.

⁷⁰⁷ Cf. Gil Eyal, ‘For a Sociology of Expertise: The Social Origins of the Autism Epidemic’, *American Journal of Sociology* 118, no. 4 (2013): 863–907.

⁷⁰⁸ I have already touched upon Abbott’s work in Chapter 1 – and here in particular on his use of the concept of jurisdiction.

⁷⁰⁹ Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: The University of Chicago Press, 1988). Similarly, Andrew Abbott, ‘The Future of Professions: Occupation and Expertise in the Age of Organization’, *Research in the Sociology of Organizations* 8 (1991): 17–42.

⁷¹⁰ As Abbott puts it: ‘But the basic form of expert person in modern society is the professional, an individual in (supposedly) lifelong, exclusive practice of a particular expertise’, Abbott, ‘The Future of Professions’, 26. Alternatively, expertise can also reside in commodities or organizations, see Abbott, 21–26.

⁷¹¹ Below in this chapter I will provide a longer reconstruction of Kennedy’s account.

on *interprofessional competition*.⁷¹² In other words, Abbott rejects ‘internal’ attempts, which explain the success of certain professions by analysing the establishment of associations, journals, licenses, schools and/or ethical codes.⁷¹³ Instead, a sociology of professions, understood in terms of a sociology of expertise, should investigate a certain field (or realm) of work and how different professions – constituting a *system of professions* – compete within this field over the control of its central working processes – its “tasks and problems”.⁷¹⁴ The link between a “profession and its work” is called “jurisdiction”.⁷¹⁵ Every profession attempts to expand and consolidate its “jurisdiction—that is legitimate control—over a problem”.⁷¹⁶ However, professions do not only expand or consolidate their jurisdiction as they might dissolve as well, when losing their jurisdiction, or transform, when different jurisdictions amalgamate or divide.

In this context two implications are important. Firstly, looking at the work of professions and how professions grow, consolidate and shrink their jurisdiction does not mean that a respective area of work is conceptually as fixed or pre-supposed (which would only signify a reversion of the relationship between profession and its working area compared to traditional approaches where the concept of profession was fixed and the respective working area rather loose).⁷¹⁷ As Abbott points out the relationship between professions and their work is reciprocal and co-constitutive as “professions both create their work and are created by it”.⁷¹⁸ As a corollary, a “differentiation in types of work [...] often leads to serious differentiations within the professions”.⁷¹⁹ Secondly, as Abbott opts for a dynamic approach, he is capable to analyse, the “evolution and interrelations” of professions and refutes to think of professions in pre-established categories and

⁷¹² For traditional accounts see, for example, Everett C. Hughes, *On Work, Race, and the Sociological Imagination* (Chicago: University of Chicago Press, 1994); and Eliot Freidson, *Professionalism: The Third Logic* (Cambridge: Polity, 2001).

⁷¹³ Abbott, *The System of Professions*, 5, 316.

⁷¹⁴ Abbott, 314.

⁷¹⁵ Abbott, 20.

⁷¹⁶ Andrew Abbott, ‘Jurisdictional Conflicts: A New Approach to the Development of the Legal Professions’, *American Bar Foundation Research Journal* 11, no. 2 (1986): 191.

⁷¹⁷ What is, however, presupposed are the professions - as interacting bodies - themselves. According to Abbott, one has always to presuppose something - and in his take on a sociology of professions, professions are presupposed as discrete bodies. See Andrew Abbott, ‘Things Of Boundaries’, *Social Research* 62, no. 4 (1995): 857–858.

⁷¹⁸ Abbott, *The System of Professions*, 316.

⁷¹⁹ Abbott, 18–19.

advocates a “very loose definition” of professions as “exclusive occupational groups applying somewhat *abstract knowledge* to particular cases”.⁷²⁰ Thus, professions are successful social fabrics as they are in the possession of specific knowledge rather than of other gate-keeping devices. In this regard, it is a particular kind of knowledge – *expertise* in the form of “abstract knowledge”⁷²¹ or “complex knowledge”⁷²² –, which makes certain professions such as medicine or law particularly successful. This knowledge is, on the one side, not as practical as a “technique” of a craft but, on the other side, it is also not too abstract as, for instance, academic disciplines usually do not form professions. The professions of law and medicine were successful in the jurisdictional struggles of their respective working fields because they were able to balance abstract knowledge in an acceptable way.⁷²³ Finally, it is the success of abstract knowledge that helps Abbott to explain why professionalism “has been the main way of institutionalizing expertise in industrialized countries”.⁷²⁴

3.3 The Juridical Field and the Force of Law(yers) (Bourdieu)

As a *second* tradition, Pierre Bourdieu’s reflexive sociology (of law) had a major impact on social and legal theory – and beyond.⁷²⁵ As it was the case with Abbott’s jurisdictional account, Bourdieu is interested in how a profession like the legal profession – as a distinct body of expertise – managed to become as powerful as it is. Here, Bourdieu rejects both internal (attributed to Hans Kelsen’s formalism) as well as external (attributed to Louis Althusser’s instrumentalism) perspectives on law and argues instead that law should be conceived as a specific “field”, namely the “judicial field”. “The judicial field”, Bourdieu claims, “is the site of competition

⁷²⁰ Abbott, 8 (emphasis added).

⁷²¹ Abbott, 8.

⁷²² ‘By expertise I mean the ability to accomplish complicated tasks; I could alternatively speak of it as complex knowledge’, Abbott, ‘The Future of Professions’, 19.

⁷²³ For example, Abbott reconstructs in an in-depth historical study how the legal profession in England (1870-1940) and the United States (1919-1950) was able to expand and consolidate its jurisdiction. While in England the main competitor was the state and its bureaucracy, in the United States it were business corporations, see Abbott, ‘Jurisdictional Conflicts’.

⁷²⁴ Abbott, *The System of Professions*, 323.

⁷²⁵ I will mainly focus on Bourdieu’s seminal article on the judicial field: Bourdieu, ‘Force of Law’; An excellent contextualisation of Bourdieu’s other writings on law and how this connects to the study of global law is presented by Yves Dezalay and Mikael Rask Madsen, ‘The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law’, *Annual Review of Law and Social Science* 8 (2012): 433–52.

for monopoly of the right to determine what the law is".⁷²⁶ Concretely, Bourdieu is mainly interested in the structure, peculiarities and exclusionary forces of the judicial field. Above all, the "institution of the 'judicial space'" presents a "borderline" or "social division" between specialists (the legal profession and its institutions) and non-specialists (laypeople or clients).⁷²⁷ The legal profession is, in other words, able to produce and maintain their own field and exclude laypeople. This is so, as Bourdieu stresses, because legal "professionals create the need for their own services by redefining problems expressed in ordinary language as *legal* problems, translating them into the language of the law".⁷²⁸

In addition, legal professionals develop solutions to these problems, which are in turn only accessible through legal language and hence the legal professionals themselves. In other words, the legal profession creates its own demand. Field and expertise are co-productive. For example, even though laypeople may be aware that they have rights (as entitlements), in particular situations they might only be able to claim these rights by relying on the help of legal professionals.⁷²⁹ This implies that one could be in the right but not be able to win a case before a court without professional legal support. Those, who are not legal professionals, are thus silenced to some extent. This means also that "[j]udicial institutions produce their own problems and their own solutions according to a hermetic logic unavailable to laypeople".⁷³⁰ Furthermore, the legal profession is able to maintain their "professional monopoly over the production and sale of [...] legal services" by controlling specific forms of education (e.g., by requiring certificates and degrees) or by demanding a specific language and structure of argumentation, which involves rules of what can be said (and not said) and how it can be said.⁷³¹ In this regard, Bourdieu argues that legal language produces three specific effects: firstly, the "*appropriation effect*" helps law to integrate different problems into its own field (as it combines "elements taken directly from the common language and elements foreign to its system"); secondly, the "*neutralization effect*" helps to make personal matters impersonal (by relying on "passive and impersonal

⁷²⁶ Bourdieu, 'Force of Law', 817.

⁷²⁷ Bourdieu, 817, 828.

⁷²⁸ Bourdieu, 834 (emphasis in the original).

⁷²⁹ Bourdieu, 833.

⁷³⁰ Bourdieu, 834.

⁷³¹ Bourdieu, 835.

constructions”); thirdly, the “*universalization effect*” works in a similar way as it makes singular legal cases part of a greater whole (through the invocation of norms).⁷³²

By developing their own idiom legal professionals are able to participate in processes of “worldmaking” and are hence part of the “dominant forces” in society.⁷³³ Interestingly, however, Bourdieu does not only emphasise the struggles between laypeople and legal professionals, i.e. the boundary work between legality and non-legality, but also points to the struggles and the specific division of labour *within* the judicial field itself. In this regard, Bourdieu observes a “[s]tructural hostility” between “theorists”, on the one hand, and “practitioners”, on the other hand, which is “at the origin of a permanent symbolic struggle in which different definitions of legal work as the authorized interpretation of canonical texts confront each other”.⁷³⁴ This struggle is carried out mainly between the holders of two roles: the professor of law and the judge. Moreover, this struggle took and takes place differently in different countries and produces, in turn, different forms of law. While the Anglo-American tradition is primarily judge-based, the French and German tradition is mainly the “law of the professors”. Both traditions are different because judges and professors prefer different forms of law. While legal professors advocate a perfectly deductive system of “pure law”, practitioners emphasise its “applicability”.⁷³⁵

3.4 Making Things Legal (Latour, Jasanoff)

As a *third* context, the broader movement of what has become known as ‘sociology of translation’,⁷³⁶ science and technology studies (STS) and/or actor-

⁷³² Bourdieu, 819–820. However, as Nicholas Onuf notes, universality might be a problematic criterion when it comes to the analysis of international law. International law operates mainly in horizontal dyads between states without presupposing a universal *telos* of international law, Nicholas Onuf, ‘Old Mistakes: Bourdieu, Derrida, and the “Force of Law”’, *International Political Sociology* 4, no. 3 (2010): 316.

⁷³³ Bourdieu, ‘Force of Law’, 838, 842.

⁷³⁴ Bourdieu, 821.

⁷³⁵ Bourdieu, 822, 825.

⁷³⁶ For a seminal contribution, see Michel Callon, ‘Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay’, in *Power, Action and Belief: A New Sociology of Knowledge*, ed. John Law (London: Routledge, 1986), 196–223.

network theory (ANT) improved significantly our understanding of the nexus of law and expertise.⁷³⁷ In particular three arguments stand out here.

Firstly, this research tradition provides us with a more accurate picture of *how the law actually works* as it points – by drawing on material semiotics – to the *material* dimension – the *materiality* – of law and legality.⁷³⁸ As Bruno Latour, one of the main figures of the ANT movement, reminds us “[j]urists always speak of texts, but rarely of their materiality”.⁷³⁹ Following this observation, it is (among others) Latour, who studies the materiality of law and legality. To study legality in this way means also to treat law as a “network of people and things”⁷⁴⁰ and to ‘open the black box’ of law.⁷⁴¹ In particular, Latour’s ethnographically inspired study of the French *Conseil d’Etat* (the ‘Council of the State’) stands out,⁷⁴² where Latour traces back the “meandering trajectory”⁷⁴³ and circulation of legal materials such as files and other legal documents.⁷⁴⁴ By analysing how a collection of papers grows and fattens, folds and unfolds, how it collects stamps and signatures, how it wanders from shelves to desks and back from desks to shelves, how it is used during debates, sessions and meetings, helps Latour to understand the ‘alchemy’ of

⁷³⁷ Cf. Bruno Latour, ‘Networks, Societies, Spheres: Reflections of an Actor-Network Theorist’, *International Journal of Communication* 5 (2011): 796–810.

⁷³⁸ For a discussion of the use of semiotics in Latour’s legal analysis see Niels van Dijk, ‘The Life and Deaths of a Dispute: An Inquiry into Matters of Law’, in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: Edinburgh University Press, 2015), 161–165.

⁷³⁹ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat* (Cambridge: Polity, 2010), 71. For a recent discussion of the materiality of law, see also Andreas Philippopoulos-Mihalopoulos, ‘Flesh of the Law: Material Legal Metaphors’, *Journal of Law and Society* 43, no. 1 (2016): 45–65.

⁷⁴⁰ Ron Levi and Mariana Valverde, ‘Studying Law by Association: Bruno Latour Goes to the Conseil d’Etat’, *Law & Social Inquiry* 33, no. 3 (2008): 806; on the central role of the notion of network in Latour’s research more generally, see Latour, ‘Networks, Societies, Spheres’.

⁷⁴¹ On the research strategy of ‘opening the black box’ and how this could be part of a reconstructive mode of inquiry see my discussion in Chapter 1.

⁷⁴² Latour, *The Making of Law*. For an excellent discussion of this book see Levi and Valverde, ‘Studying Law by Association’. For a recent analysis of law as a specific ‘mode of existence’, see Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (Cambridge: Harvard University Press, 2013), chap. 13; and Bruno Latour, ‘The Strange Entanglement of Jurimorphs’, in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: Edinburgh University Press, 2015), 331–53. For a broader overview on Latour take(s) on law see the discussions in Kyle McGee, ed., *Latour and the Passage of Law* (Edinburgh: Edinburgh University Press, 2015); Marcus Twellmann, ed., *Wissen, wie Recht ist: Bruno Latours empirische Philosophie einer Existenzweise* (Konstanz: Konstanz University Press, 2016); and Filipe dos Reis and Hagen Schölzel, ‘Artikulationen im Herzen des Staates - Bruno Latours Diskussion des Rechts und deren deutsch- und englischsprachige Rezeption’, *Zeitschrift für Politische Theorie* 8, no. 2 (2017): 291–98.

⁷⁴³ Latour, ‘The Strange Entanglement of Jurimorphs’, 333.

⁷⁴⁴ Cf., in particular, Latour, *The Making of Law*, chap. 2. For another fascinating study of files see Cornelia Vismann, *Files: Law and Media Technology* (Stanford: Stanford University Press, 2008).

how a piece of paper of a singular case is *translated* into ‘the’ law as the “progressive articulation of the case, from the lawyer’s office up to the display of the final judgements, consists of making the case more and more like the law just by having the arguments or the grounds at every stage better arrayed and regrouped”.⁷⁴⁵ The ‘passage of law’ is hence a process of “fractional distillation”;⁷⁴⁶ it consists of various processes of piling, handling, assembling, circulating, combining, coding, etc. – a process that was termed by Kyle McGee recently as ‘jurimorphing’. As McGee explains further, during the passage of law “the various entities and agents at stake are semiotically re-configured – jurimorphised”.⁷⁴⁷ It is during the passage of law where, as Latour describes it,

“a series of transformations, translations, transmutations, transubstantiations unfolds; by degrees, and by paying—sometimes very dearly—for an endless lineup of clerks, lawyers, judges, commentators, professors, and other experts, the passage of law gradually modifies the relation between the *quantity* of facts, emotions, passions, as it were, and the *quantity* of principles and texts on which it will be possible to rule. This proportion of relative quantities is known by the admirable term ‘legal *qualification*’”.⁷⁴⁸

Studying the process of jurimorphing, “*step by step*”, demonstrates furthermore that “Law is [...] *procedure*” and that the “power of the law, like that of a chain, is exactly as strong as its weakest link”.⁷⁴⁹ It demonstrates also that focussing on the material and procedural dimension of law at the same time undermines the distinction between the law of the books and the law of action – a distinction (as we have seen above) emphasised by Bourdieu. And it demonstrates that once a case has been translated into a judgment it has become ‘the law’, at least as part of case-law and can then, e.g., be cited in subsequent judgments or by legal

⁷⁴⁵ Latour, *The Making of Law*, 88 (references omitted).

⁷⁴⁶ Latour, *An Inquiry into Modes of Existence*, 365.

⁷⁴⁷ Kyle McGee, ‘On Devices and Logics of Legal Sense: Towards Socio-Technical Legal Analysis’, in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: Edinburgh University Press, 2015), 64. See also the discussion in Latour, ‘The Strange Entanglement of Jurimorphs’. For a careful reconstruction of the various steps of jurismorphing in a court case see van Dijk, ‘The Life and Deaths of a Dispute’, 165–179.

⁷⁴⁸ Latour, *An Inquiry into Modes of Existence*, 364 (emphasis in the original).

⁷⁴⁹ Latour, *The Making of Law*, 90 (emphasis in the original).

academics. This kind of fixation constitutes then law's structural conservatism as legal experts are "not looking for novelty or for access to remote states of affairs; they are seeking only to stir up this fact in every direction in order to see what principles could actually be used to judge it; they are seeking only to stir up all principles until they find the one that could perhaps be applied *also* to this fact".⁷⁵⁰

Secondly, on the basis of treating law as a 'network of people and things' and of studying the 'passage of law', Latour started more recently to develop a specific *concept of law* and elaborate on the specific *function of law*. Thus, Latour is in particular interested in the question of what makes law specific ('original') and distinguishes it – what creates its "respectful difference"⁷⁵¹ – from other 'modes of existence' such as politics or religion.⁷⁵² According to Latour, law is specific compared to other modes as it does *archive* its

"successive shiftings and translations. [The] originality of law lies right here. To ensure continuity despite discontinuity, law links to one another the various levels that shifting out keeps on multiplying. [...] Thanks to law, you can *multiply the levels of enunciation without causing them to disperse*".⁷⁵³

Law is able to fulfil this paradoxical task because "*law is its own metalanguage*";⁷⁵⁴ and because it is both "*superficial and formal*".⁷⁵⁵ On the one hand, being superficial guarantees that it is so open that everything can be attached to it; being formal guarantees, on the other hand, the continuity of the legal enterprise. Moreover, as Latour substantiates, the

⁷⁵⁰ Latour, *An Inquiry into Modes of Existence*, 364 (emphasis in the original).

⁷⁵¹ Latour, 360.

⁷⁵² To compare different 'modes of existence' shows at least on a first view similarities with Niklas Luhmann's theory of differentiation. However, Latour distinguishes his endeavour sharply from Luhmann's. According to Latour, Luhmann differentiates in terms of domains and builds these domains according to professional occupations, see Latour, 'The Strange Entanglement of Jurimorphs', 339, 344. Latour follows here explicitly Graham Harman's observation that '[i]f Luhmann tends to locate each of his "social systems" in a distinct professional place, Latour conceives of his modes as separate radio frequencies all occupying the same air space', Graham Harman, 'Politics and Law as Latourian Modes of Existence', in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: Edinburgh University Press, 2015), 50.

⁷⁵³ Latour, *An Inquiry into Modes of Existence*, 369 (emphasis in the original). On the idea to treat law as 'regime[...] of enunciation', see also Latour, *The Making of Law*, 273.

⁷⁵⁴ Latour, *An Inquiry into Modes of Existence*, 334.

⁷⁵⁵ Latour, 361 (emphasis in the original).

“originality of law can be identified by the very notion of *procedure*; the assignation, the *signature* and its quite distinct ‘tremor,’ since it leaps over the division of levels of enunciation; imputation; qualification, the link between text and case (what does it mean to be a ‘journalist in the sense of article 123 of the code?’); and even canonical definitions such as responsibility (‘so-and-so is indeed the author of this act’), authority (‘this person is indeed authorized to sign the acts’), property (‘this person indeed has to hold that piece of land’).⁷⁵⁶

In this context, Latour continues, “characters become assigned to their acts and to their goods. They find themselves responsible, guilty, owners, authors, insured, protected. And this authorizes us to say that ‘without law,’ utterances would be quite simply *unattributable*”.⁷⁵⁷ In other words, law creates “*quasi* subjects”.⁷⁵⁸

Thirdly and connected to the previous observations, we can find in this literature an emphasis of the agentic quality of non-human ‘actants’ (such as ‘quasi subjects’) and, hence, the focus on their performative dimension.⁷⁵⁹ As we have seen in Latour’s reconstruction of the trajectory of files at the Council of the State, it is the file, which has agentic qualities. The same holds of course true with other non-human devices in legal settings (and beyond); and, in the end, the same holds also true with law and different forms of expertise, which are entangled to it. A good example in this regard is Sheila Jasanoff’s reconstruction of how non-legal expertise (Jasanoff’s examples are drawn mainly from the natural and life sciences) is used in US-American court-cases.⁷⁶⁰ In contrast to what is commonly assumed scientific knowledge does not *just* ‘enter’ the courtroom and scientific expert witnesses do not *just* present the facts before the court, but things are more

⁷⁵⁶ Latour, 370 (emphasis in the original).

⁷⁵⁷ Latour, 370–371 (emphasis in the original).

⁷⁵⁸ Latour, 372 (emphasis in the original). Latour lists in his ‘anthropology of the moderns’ two other modes of existence, which create quasi-subjects, namely religion and politics. For example, politics and law can be distinguished by the fact that politics operates in cycles while law is always directed towards a decision, Latour, chap. 12–13.

⁷⁵⁹ Latour refers here explicitly to John Langshaw Austin’s notion of ‘performativity’, see Latour, ‘The Strange Entanglement of Jurimorphs’, 336.

⁷⁶⁰ Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge: Harvard University Press, 1995).

complicated as we can observe that fact finding is a complex endeavour of boundary negotiations between law and (natural) science.⁷⁶¹ For instance, the process of fact-finding in science is, at least theoretically, open-ended as the aim is to get the facts 'right' while, on the other hand, fact-finding in front of a court is subject to procedural (legal) rules and "always bounded in time: inquiry has to stop when the evidence is exhausted".⁷⁶² This does not mean that courts do not attempt to get the facts right, but that getting the facts right does mean something different in a scientific setting compared to a legal one.⁷⁶³ This difference does however not imply that we should present scientific and legal reasoning as independent and de-coupled modes of reasoning. Rather, as Jasanoff puts it, "the cultures of law and science are in fact mutually constitutive [...]", as, for instance, the legal rules of a court will have a direct impact on what counts as good science more generally. To study their relatedness could, in the end, help us to understand "how these institutions *jointly* produce our societal knowledge, and our relationship with technological objects".⁷⁶⁴

4. The Politics of Expertise in International Law

As we have seen earlier in this chapter, traditional mainstream accounts distinguish between expertise and politics, knowledge and power. And with the exception of Schachter's 'invisible college of international lawyers' do not refer to the knowledge form of law as expertise. As I have shown, there are literatures in social theory challenging this boundary. This section turns now to the work of more critical scholars in the intersection of IR and IL. It starts with a general overview (4.1); situates then the discussion in the debate(s) on managerialism, fragmentation and constitutionalisation of international law (4.2); reconstructs in detail how critical approaches frame the politics of expertise in international law

⁷⁶¹ For an at-large discussion of the similarities and differences between scientific reasoning see also Latour, *The Making of Law*, chap. 5.

⁷⁶² Jasanoff, *Science at the Bar*, 9.

⁷⁶³ To be precise, the truth claims are different. While in law every matter that is legally decided counts as truth - in line with the Roman law proverb *res judicata pro veritate habetur* (the matter which has been adjudicated shall be taken as the truth) -, scientific search for truth is open ended, see Latour, *The Making of Law*, 235–243.

⁷⁶⁴ Jasanoff, *Science at the Bar*, 7 (emphasis in the original).

(4.3); and finally argues that we should pay more attention to the technicalities involved in the politics of expertise in international law (4.4.).

4.1 Is Expertise A-Political and Non-legal?

When we turn our attention now to the work of more critical scholars in IR and IL and their assessment of the politics of expertise in international law, we can observe that the recent developments in social theory, which I introduced in the previous section, influenced these approaches in many ways. By mobilizing these literatures critical approaches are able to go beyond more traditional frameworks on expertise in IR and IL (see section 2 of this chapter). As noted above, the concept of expertise was during the interwar years linked to the idea to make insights from early academic IR and its neighbouring disciplines such as IL or diplomatic history available to politicians and other practitioners. Behind this image of expertise stood the assumption that the most penetrating problems of international affairs, such as the elimination of war, can only be solved in a *technical* and *a-politicised* way. Consequently, it was then the task (and function) of the scientific study of international affairs to find these technical solutions – solutions, which were usually located within a complex system encompassing legal, institutional, educational and ‘propagandistic’ factors. This problem solving (self-)image gave IR the opportunity to claim its own disciplinary *jurisdiction* among competing disciplines in order to fill up the *lacuna* of missing technical knowledge on an international scale. In turn, IR then produced a demand in problem-solving expertise. Expertise and jurisdiction are co-constitutive. This was not only restricted to the interwar years as, for example David Mitrany’s early functionalism pointed into the same direction.

What stands out in these accounts – and it seems to be still the case for most of contemporary ‘mainstream’ literature on expertise in IR – is the idea that experts and expertise are impartial, neutral, objective and stand outside the realm of politics. We can find, as among others Frédéric Mégret, Anna Leander and Tanja Aalberts have noted, similar conceptualisations of experts and expertise in the field of IL and, here, most prominently articulated in Oscar Schachter’s notion of an

‘invisible college of international lawyers’, whose function encompasses, on the hand, the mediation between different sources of external (i.e. *extra-legal*) expertise and, on the other hand, their translation back into the language(s) of international law; a similar position can be found in contemporary scholarship claiming the impartiality of judges and experts before courts.⁷⁶⁵ Although these different approaches differ in many aspects, they nevertheless belong to a similar image of the ‘international’, namely the international in terms of ‘international organisation’ – something that links of course also to the previous discussion in Chapter 2 on different conceptualisations of the ‘international’ in different interdisciplinary projects between IR and IL.

This image of the role of experts and expertise changed already significantly in the literature on epistemic communities, as experts and expertise are not framed as apolitical, impartial and neutral anymore. In the epistemic communities framework experts rather help to pursue certain political projects and, in particular, play a crucial role when decision-makers are confronted with uncertainty and ambiguous knowledge. Put differently, experts are here part of larger processes of ‘global governance’ (the prevailing image of the international in these approaches). Yet, more critical approaches go further and introduce two important corrections. First, for example, Ole Jacob Sending argues in his Bourdieu-inspired account on international expertise that agency related approaches to expertise, such as the literature on epistemic communities or Barnett and Finnemore’s study of the bureaucratization of world politics, are limited to a certain extend as each of these accounts focuses only on one specific type of actors at a time and reconstruct then the trajectories of these actors.⁷⁶⁶ Sending suggests that research on expertise should focus instead on different groups of experts – ranging from advocacy groups to international public servants to diplomats – and examine particularly the ‘in-between’ of these groups in order to understand how expert groups compete over authority. In other words,

⁷⁶⁵ Cf. Anna Leander and Tanja Aalberts, ‘Introduction: The Co-Constitution of Legal Expertise and International Security’, *Leiden Journal of International Law* 26, no. 4 (2013): 783–92; and Frédéric Mégret, ‘International Judges and Experts’ Impartiality and the Problem of Past Declarations’, *The Law and Practice of International Courts and Tribunals* 10, no. 1 (2011): 31–66.

⁷⁶⁶ Ole Jacob Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (Ann Arbor: University of Michigan Press, 2015), 4. Sending engages in his critique explicitly with Haas, ‘Introduction’; and Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004).

authority does not originate from the ‘inside’ of expert groups but is the result of a successful “claim to represent the international in an impartial and neutral way”.⁷⁶⁷ Second, in line with this observation, some authors such as Leander and Aalberts challenge the “presentation of law versus expertise” and claim, instead, that “legal expertise is an expertise among many others”.⁷⁶⁸ This helps to leave the image of, for instance, the ‘epistemic communities’ approach behind, which linked expertise to fields that are primarily concerned with ‘hard’ and ‘hybrid’ facts. Consequently, the world of ‘social’ facts becomes an object of study in the analysis of expert work as well – or, if we push this argument even further, the distinction between ‘hard’, ‘hybrid’ and ‘social’ facts might even collapse in favour of ‘social’ facts as ‘hard’ and ‘hybrid’ facts might be considered part of the ‘social construction of reality’. In a nutshell, critical scholarship break with two fundamental assumptions of traditional conceptualisations of expertise in IR and IL, namely that, expertise is apolitical, neutral, impartial and, importantly, non-legal.

4.2 Managerialism, Fragmentation, Constitutionalisation

The more critical literature on international legal expertise is embedded in intersecting literatures, which circle around three concepts: managerialism, fragmentation and constitutionalisation.

4.2.1 Managerialism

As noted in Chapter 2, different attempts to initialise an interdisciplinary project between mainstream IR and IL took the notion of legitimacy as their starting point. This ‘turn to legitimacy’ is for some critical scholars – and, here, especially Martti Koskenniemi stands out – part of a number of far-reaching transformations; transformations that are located in a broader *turn to ‘managerialism’* in

⁷⁶⁷ Sending, *The Politics of Expertise*, 5; see also Sending, chap. 1. Sending’s analysis resembles here, of course, also Andrew Abbott’s project to study expertise as a ‘system of professions’ in which different professions compete to expand and stabilize their respective ‘jurisdiction’. For more, see my discussion of Abbott’s approach in the previous section.

⁷⁶⁸ Leander and Aalberts, ‘The Co-Constitution of Legal Expertise and International Security’, 785.

international law. As Koskenniemi depicts the far-reaching results of the development, where

“managerialism turns into absolutism: the absolutism of this or that regime, this or that system of preferences. The lawyer becomes a counsel for the functional power-holder speaking the new natural law: from formal institutions to regimes, learning the idiolect of ‘regulation’, talking of ‘governance’ instead of government and ‘compliance’ instead of ‘responsibility’. The normative optic is received from a ‘legitimacy’, measured by international relations – the Supreme Tribunal of a managerial world”.⁷⁶⁹

What is important to not: It is less, if I understand Koskenniemi correctly, ‘Koskenniemi-the-lawyer’ who experiences it as a problem that international lawyers are loosing their hegemonic position to their academic competitors from IR when it comes to interpret the ‘international’, but it is rather the anxiety of ‘Koskenniemi-the-critical-scholar’ who fears that the various transformations generated by the managerial project would make the possibility to utter fundamental critique nearly impossible. In other words, Koskenniemi fears that any possibility to engage in critical theory (written in small or capital letters) as any prospect to develop broader strategies of critique could be substituted by the vernaculars attached to social engineering, problem-solving, legal instrumentalism and ‘empirical social science’.⁷⁷⁰ Yet, that for Koskenniemi projects these developments towards the academic field of IR as a whole is then, however, a problem of his myopic reading of IR as the discipline of ‘regimes’, ‘institutional design’, ‘legitimate global governance institutions’, ‘legalization’, etc. In the end, such an understanding of IR makes, on the one hand, fruitful conversations between critical scholars in both disciplines nearly impossible as it portrays, on the other hand, IL as ‘unproblematic’ when it comes to the spread of

⁷⁶⁹ Martti Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’, *European Journal of International Relations* 15, no. 3 (2009): 411; see also Martti Koskenniemi, ‘Formalism, Fragmentation, Freedom: Kantian Themes in Today’s International Law’, *No Foundations* 4 (2007): 11–17.

⁷⁷⁰ The classic articulation of the distinction between critical theory and problem-solving accounts is of course Robert W. Cox, ‘Social Forces, States and World Orders: Beyond International Relations Theory’, *Millennium* 10, no. 2 (1981): 126–55.

managerialism (leaving, e.g., developments such as American legal process schools beside). In any case, with regard to ‘managerialism’ the following passage, taken from a discussion about “hegemonic regimes”, is typical for Koskeniemi’s concern:

“Managerialism is not a solution. It is a problem. To deal with it could begin with the translation of its vocabularies, the language of science, economics, technique – and law – in political terms. [...] Vocabularies have histories that are tied with the genealogy of particular forms of rule. Gazing into the future in a problem-solving mode prevents asking the question about how it is that we are ruled by *these* languages, *these* men and women. Managerialism thinks of itself as a hill from which it is possible to see far. In truth it is a valley in which we always look in the same direction – and all the interesting questions lie behind our back”.⁷⁷¹

Of course, the critique of ‘managerialism’ is far from new for critical legal scholars.⁷⁷² Duncan Kennedy, for example, pointed more than twenty years ago, although taking a more general Marxism-plus-semiotics route, into the same direction. For Kennedy, the legal discourse, as it is dominated by liberal and conservative ideas, has turned into an “instance of managerial discourse in general”. The problem with ‘managerialism’ is not that there is no space for critique. In fact, on a first view rather the opposite seems to be the case as ‘managerialism’ is explicitly welcomes for critique. However, a second view reveals the how narrow the ‘bounds of critique’ are as critique is only justified (and thereby utterable) in order to improve the managerial discourse from within.

⁷⁷¹ Martti Koskeniemi, ‘Hegemonic Regimes’, in *Regime Interaction in International Law: Facing Fragmentation*, ed. Margaret A. Young (Cambridge: Cambridge University Press, 2012), 324 (emphasis in the original).

⁷⁷² Interestingly, however, as Fleur Johns notes, Koskeniemi never really substantiates the concept of managerialism (with the exception of the above mentioned semantic shifts of adjunct concepts). As Johns puts it, ‘Koskeniemi seems, for most part, ill-inclined to map this managerialist expanse except in the broadest stokes. This is noteworthy given the ambition and tirelessness otherwise characteristic of his work’, Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013), 15–16. For a short genealogy of managerial rule in international law, see Orford, *International Authority and the Responsibility to Protect*, 199–205. For a more general discussion, see Samuel Knafo et al., ‘The Managerial Lineages of Neoliberalism’, *New Political Economy*, forthcoming.

Critique becomes then rather a project of permanent adjustment where the claims for fundamental transformation are silenced: 'Managerialism' manages it that there appears to be "no alternative" to 'managerialism' as the underlying form of rule. "[W]hile it is permissible to manipulate 'at the margins'", Kennedy notes, "it is important not to 'go too far' in trying to achieve extradiscursive political objects". As a result, this makes "moderation" a "metarule" as if "you take your liberal or conservative views about how to handle the distributively significant leeways within the mission statement too far, you risk 'politizing' the institution, and you will be seen as 'disloyal'".⁷⁷³

4.2.2 Fragmentation

The relationship of 'managerialism' and politicization plays also an important role in the literature on the *fragmentation of international law*. The observation that international law is witnessing a process of fragmentation links to the paradoxical situation, which I have described previously in this chapter when discussing contributions on the emergence of 'knowledge societies' in more 'advanced' societies. It resembles, in particular, Lyotard's critique of Bell's diagnostic utopia of the rule of technocratic elites in 'post-industrial' societies, namely that for Lyotard the proliferation of knowledge in knowledge societies does not increase the stability and unity of knowledge but rather produces uncertain and fragmented knowledge: different forms of expertise, conceptualised as 'paralogical language games', compete over discursive hegemony.⁷⁷⁴ In a similar vein, those who observe of a fragmentation of international law emphasise that the 'legalization of world politics' is not only related to the expansion and 'turn' to law on the international level, but marks also the beginning of the end of international legal unity as it was presented, e.g., in Schachter's 'invisible college of international lawyers'. As we have seen in my discussion above of the 'invisible college', Schachter was convinced, when writing in the late 1970s that the international legal profession would be immune to processes of 'compartmentalization' as

⁷⁷³ Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge: Harvard University Press, 1998), 368–370.

⁷⁷⁴ See also Werner, 'The Politics of Expertise'; and Kessler and Werner, 'Expertise, Uncertainty, and International Law', 794–795.

witnessed at that time in the natural and social sciences. Yet, the fragmentation literature argues that Schachter's prediction was wrong as we are witnessing increasingly processes of 'compartmentalization', 'differentiation', 'diversification', 'disaggregation' and fragmentation of the international legal order. The diagnosis of a possible fragmentation of international law caused in the early 2000s serious anxieties – "postmodern anxieties" – among many international lawyers and spurred an intensive debate within the profession.⁷⁷⁵ In order to understand the extent and nature of fragmentation, the *International Law Commission*, chaired by Koskenniemi, was authorised in 2000 by the UN General Assembly to render an expert opinion on the subject matter. As we can read in the final report of the *International Law Commission*,

"The fragmentation of the international social world has attained legal significance [...]. What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialized knowledges as 'investment law' or 'international refugee law' etc. – each possessing their own principles and institutions".⁷⁷⁶

Although coming from a perspective that speaks rather of 'autopoietic regimes' than of "hegemonic regimes"⁷⁷⁷, Andreas Fischer-Lescano and Gunther Teubner arrive at a similar conclusion when they write that

"[i]n contrast to the constantly reiterated claims, the appearance of global regimes does not entail the integration, harmonization or, at the very least, the convergence of legal orders; rather, it transforms the

⁷⁷⁵ Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law* 15, no. 3 (2002): 553–79. For an excellent exposition of the different accounts dealing with the fragmentation of international law, see Anne-Charlotte Martineau, *Le débat sur la fragmentation du droit international: une analyse critique* (Brussels: Bruylant, 2015).

⁷⁷⁶ International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682', 13 April 2006, para. 8.

⁷⁷⁷ Koskenniemi, 'Hegemonic Regimes'. On the differences between 'autopoietic regimes' and 'hegemonic regimes', see Martineau, *Le débat sur la fragmentation du droit international*, chap. 8–9.

internal differentiation of law”.⁷⁷⁸

According to Fischer-Lescano und Teubner “[a]ny attempts to a normative unity of global law are [...] doomed from the outset” and rather an “intensified legal fragmentation” is likely to occur.⁷⁷⁹ Being theoretically indebted to Niklas Luhmann’s theory of differentiation and his concept of world society, Fischer-Lescano and Teubner stick to Luhmann’s prediction that the emergence of world society would not create global unity, but signifies rather that the segmentary differentiation into territories of the *international* system shifts into a functional-differentiated world society.⁷⁸⁰ Fischer-Lescano and Teubner refine Luhmann’s observation when they conceptualise the legal fragmentation of world society in terms of different legal regimes struggling for discursive hegemony with each other by means of expanding their respective jurisdiction.⁷⁸¹ The fragmentation of international law is then only one aspect of a larger societal, political, cultural, economic – and legal – transformation. As any attempt to stop or reverse this transformation is bound to fail, “rationality conflicts” between different “functional regimes” will emerge on a global scale.⁷⁸² These conflicts can at best be reduced to some extent by legal formalization and the establishment of a ‘collision law’, which

⁷⁷⁸ Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, *Michigan Journal of International Law* 25 (2004): 1009; for a more comprehensive version of the argument, see also Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006).

⁷⁷⁹ Fischer-Lescano and Teubner, ‘Regime-Collisions’, 1004.

⁷⁸⁰ Fischer-Lescano and Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, 37. For another rather Luhmannian reading see Oliver Kessler and Friedrich Kratochwil, ‘Functional Differentiation and the Oughts and Musts of International Law’, in *Bringing Sociology to International Relations: World Politics as Differentiation Theory*, ed. Mathias Albert, Barry Buzan, and Michael Zürn (Cambridge: Cambridge University Press, 2013), 159–81. For Luhmann’s original statement see Niklas Luhmann, ‘Die Weltgesellschaft’, *Archiv für Rechts- und Sozialphilosophie* 57, no. 1 (1971): 1–35. Most authors on fragmentation either follow Fischer-Lescano and Teubner’s Luhmannian perspective or do not deeper theorise fragmentation in social theoretical terms. They remain at the level of symptoms and do not inquire into the roots of fragmentation (Why is fragmentation happening? What are the transformations at stake?). For exceptions, see the Foucauldian reading in Nikolas M. Rajkovic, ‘On Fragments and Geometry: The International Legal Order as Metaphor and How It Matters’, *Erasmus Law Review* 6, no. 1 (2013): 6–16; and for a general ‘postmodern’ take see Karl-Heinz Ladeur, ‘Constitutionalism and the State of the “Society of Networks”: The Design of a New “Control Project” for a Fragmented Legal System’, *Transnational Legal Theory* 2, no. 4 (2011): 463–75.

⁷⁸¹ Fischer-Lescano and Teubner’s use of regimes differs significantly from the neoliberal institutionalist one in IR. For further discussion see Fischer-Lescano and Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, 18–23.

⁷⁸² Fischer-Lescano and Teubner, ‘Regime-Collisions’, 1006.

could provide the arena to tame the underlying politico-legal disputes.⁷⁸³ In the end international law obtains, as Fischer-Lescano and Teubner put it, then the role of a “gentle civilizer of social systems”.⁷⁸⁴

4.2.3 Constitutionalisation

As noted, the diagnosis of a possible fragmentation of international law caused serious ‘anxieties’ among many international lawyers and should foster, - at least *prima facie* - as a counter-narrative, scholarship on (global) constitutionalism and the constitutionalization of international law.⁷⁸⁵ Although these literatures seem to project constitutional ideas directly from the nation states to the global level, a closer look reveals that it was rather the literature on the constitutional dimension of the European Union that served as foil. In general, the term constitutionalization is usually used to describe the processes, which might in the end lead to a constitution beyond the nation state, while constitutionalism denotes rather the (normative) ‘mind-set’ that welcomes these processes.⁷⁸⁶ More specifically, ‘constitutionalization’ points to processes, which strengthen legal unity as, for example, procedural systematization, principles such as *ius cogens* and obligations *erga omnes* or institutions such as the UN Charter, international organisations (such as the WTO) or globally operating courts.⁷⁸⁷ Proposals of ‘defragmentation’ are then often articulated in the language of (global) constitutionalism.⁷⁸⁸ Although

⁷⁸³ Fischer-Lescano and Teubner, *Regime-Kollisionen: Zur Fragmentierung Des Globalen Rechts*, 170–171.

⁷⁸⁴ Fischer-Lescano and Teubner, ‘Regime-Collisions’, 1045.

⁷⁸⁵ For an overview see Jan Klabbbers, Anne Peters, and Geir Ulfstein, eds., *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); and Christine E. J. Schwöbel, ‘Situating the Debate on Global Constitutionalism’, *International Journal of Constitutional Law* 8, no. 3 (2010): 611–35.

⁷⁸⁶ Martti Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’, *Theoretical Inquiries in Law* 8, no. 1 (2007): 9–36.

⁷⁸⁷ Cf. Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Martinus Nijhoff Publishers, 2009); Ernst-Ulrich Petersmann, ‘Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society’, *Leiden Journal of International Law* 19, no. 3 (2006): 633–67; and Jürgen Habermas, ‘Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?’, in *Der gespaltene Westen: Kleine politische Schriften X*, ed. Jürgen Habermas (Frankfurt am Main: Suhrkamp, 2004), 113–93.

⁷⁸⁸ For recent discussions of the fragmentation and constitutionalization debates, see Anne Peters, ‘Fragmentation and Constitutionalization’, in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 1011–31; Kessler and Kratochwil, ‘Functional Differentiation’; and Friedrich Kratochwil, *The Status of Law in*

‘constitutionalism’ might be understood as an “essentially contested concept”⁷⁸⁹ and as this involves the possibility to identify many different notions of ‘constitutionalism’ in recent debates,⁷⁹⁰ Jan Klabbers nevertheless asserts that in the end the “very idea of constitutionalism presumes that constitutionalism helps mankind into an a-political, a-ideological space, a realm somewhere beyond politics where people would no longer disagree with each other”.⁷⁹¹

Importantly, however, a number of scholars pointed out in the meantime that fragmentation and constitutionalization have not to be conceptualised as mutually exclusive but rather as “two sides of the same coin”⁷⁹² or “two processes which imply each other”.⁷⁹³ This claim is substantiated by the observation that fragmentation and constitutionalization might actually imply each other as in processes of functional differentiation not only a series of new ‘functional regimes’ emerges but that these regimes become ‘operationally closed’ and, thereby, ‘deepened’ and ‘densified’ in order to be successful in jurisdictional conflicts with other regimes.⁷⁹⁴ As a result, expressions like “constitutional fragments”⁷⁹⁵ or “hegemonic regimes” emerged in recent years.⁷⁹⁶

World Society: Meditations on the Role and Rule of Law (Cambridge: Cambridge University Press, 2014), chap. 3.

⁷⁸⁹ Jessica C. Lawrence, ‘Contesting Constitutionalism: Constitutional Discourse at the WTO’, *Global Constitutionalism* 2, no. 1 (2013): 65.

⁷⁹⁰ Christine Schwöbel, for example, identifies four dimensions in the academic debate on global constitutionalism: social constitutionalism which ‘views the international sphere as an order of coexistence’; institutional constitutionalism which seeks to control international power relations through institutions; normative constitutionalism which ‘Introduces the key themes of idealism and pays particular attention to individual rights’; and, finally, analogical constitutionalism which builds analogies between domestic and regional constitutions on the one hand and the international sphere on the other. All of these dimensions share the ‘same key themes and certain central ideas’, which are the institutionalization of power, social idealism, the systematization of law, and the recognition of individual rights, but differ in the emphasis of them. Schwöbel, ‘Situating the Debate on Global Constitutionalism’, 613, 617, 625, 630, 634.

⁷⁹¹ Jan Klabbers, ‘Constitutionalism Lite’, *International Organizations Law Review* 1, no. 1 (2004): 54.

⁷⁹² Peters, ‘Fragmentation and Constitutionalization’, 1030.

⁷⁹³ Kessler and Kratochwil, ‘Functional Differentiation’, 166.

⁷⁹⁴ Klabbers refers to this as ‘the paradox of constitutionalism [...]’: Fighting fragmentation by constitutionalism will [...] only result in deeper fragmentation, as the various regimes and organizations will be locked firmly in constitutional place - and in battle with each other’, Klabbers, ‘Constitutionalism Lite’, 53. See also Kessler and Kratochwil, ‘Functional Differentiation’, 171.

⁷⁹⁵ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism in the Globalization* (Oxford: Oxford University Press, 2012).

⁷⁹⁶ Koskeniemi, ‘Hegemonic Regimes’.

Finally, an interesting shift in the way critical scholars evaluate these processes is noteworthy: while critical voices were, at least at the early stages of the fragmentation debate, often very positive about the fragmentation of international law, as fragmentation can also be understood as (a form of) global legal pluralism and as an opportunity to arrive at a richer representation of a pluralized global political landscape – something which might turn, according to Leino and Koskeniemi, in the end into “a politics of tolerance and pluralism” –,⁷⁹⁷ these voices started later to point to the ‘dark side’ of fragmentation and constitutionalization – and, in particular, its link to different forms of managerialism. The successive writings of Koskeniemi on this topic are a good example, as Koskeniemi moved from the initial hope in ‘tolerance and pluralism’ to the negative evaluation that fragmentation produces managerialism when he argues that “managerial ideologies” emerged “sometimes in the 1990s” in order to provide regimes with “economic, technical and scientific vocabularies” and related experts.⁷⁹⁸ According to Koskeniemi, managerialism was seen as attractive as it could help to bring “certainty and solidity (i.e. universal validity)” to those regimes – a potential that international law seemed to lack at that time. These vocabularies are often derived from institutional economics or rational choice – but also from legal formalism; they are part of, what Bourdieu had called, larger universalization strategy. As by “adopting a technical vocabulary, one would appear to be speaking not only for oneself, one would be representing that which is true, as technical propositions are understood in the audiences committed to them”.⁷⁹⁹ While these universalization strategies may cause a depolitization of regimes from within,

⁷⁹⁷ Koskeniemi and Leino, ‘Fragmentation of International Law?’, 579. See also: ‘Far from being a problem to resolve, the proliferation of autonomous or semi-autonomous normative regimes is an unavoidable reflection of a “postmodern” social condition and a beneficial prologue to a pluralistic community in which the degrees of homogeneity and fragmentation reflect shifts of political preference and the fluctuation success of hegemonic pursuits’, Martti Koskeniemi, ‘What Is International Law For?’, in *International Law*, ed. Malcom D. Evans, 4th ed. (Oxford: Oxford University Press, 2014), 47.

⁷⁹⁸ Koskeniemi, ‘Hegemonic Regimes’, 312. For the direct link between fragmentation and managerialism see: ‘The turn from status to contract, or from form to function. This is what international lawyers today call fragmentation. It is not only about technical specialisation [...]. The ethos of law and republicanism are replaced by individual interests, strategic planning and technical networks; formal sovereignty replaced by disciplinary power; constraint received from cognitive instead of normative vocabularies’, Koskeniemi, ‘Formalism, Fragmentation, Freedom’, 11; see also Martti Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’, *The Modern Law Review* 70, no. 1 (2007): 1–30.

⁷⁹⁹ Koskeniemi, ‘Hegemonic Regimes’, 313.

according to Koskenniemi we witness now, as regimes are expanding, “hegemonic contestation” between different regimes and their expert vocabularies.⁸⁰⁰

4.3 Critical Approaches and the *Politics* of Expertise

One result of the intersecting transformations described in the literatures on managerialism, fragmentation and constitutionalization is that the mode and site of the political in the ‘politics of international law’ seems to change gradually. This is so, as it seems that the ‘politics of international law’ has increasingly become a ‘politics of expertise’, replacing hence the initial critical project of the ‘politics of indeterminacy’, which dominated the early writings of scholars like David Kennedy, Martti Koskenniemi, Nicholas Onuf and Friedrich Kratochwil (see my discussion of their respective projects in Chapter 3). For example, Koskenniemi describes this reorientation in an article, which takes stock after two decades of his initial project of the ‘politics of international law’, in the following words:

“Political intervention is today often a politics of re-definition, that is to say, the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias. [...] None of them [the idioms] is any ‘truer’ than the others [...]. If 20 years ago it seemed intellectually necessary and political useful to demonstrate the indeterminacy (and, thus, political preference) within the idiom of public international law, today’s critique will have to focus on the clash of different idioms – public international law just one competitor among many to global authority – and highlight the way their competing descriptions work to push some actors or interests while leaving others in the shadow”.⁸⁰¹

To turn the focus to international legal expertise and the clash of different expert vocabularies has important implications. As David Kennedy and Friedrich

⁸⁰⁰ Koskenniemi, 312.

⁸⁰¹ Martti Koskenniemi, ‘The Politics of International Law - 20 Years Later’, *European Journal of International Law* 20, no. 1 (2009): 11.

Kratochwil argue, international legal experts ‘translate’ problems into their vocabularies and projects;⁸⁰² they offer, then, solutions on the basis of these vocabularies and projects. In other words, field, expertise, problem and solution are co-constitutive. Obviously, these translations are never neutral and cannot count as mere transpositions or transplantations from one context into another. Rather translations serve, as I have argued in the context of the politics of interdisciplinarity already, as sites of open mediation, rewriting and negotiation of boundaries. Translations are transformative, as every translation creates something new. What we see, if we analyse these processes of translation, is then the boundary work or management of boundaries of and through law: experts struggle over and negotiate the boundary of the jurisdiction of their respective projects.

In order to further specify what the politics of expertise could mean for critical scholars, it is helpful to link the literatures on expertise to my earlier discussion in Chapter 3 of the various ways the linguistic turn was taken in critical IR and IL. To recapitulate, following Sybille Krämer I argued that it is promising to distinguish between a ‘performance model’ and a ‘two worlds model’ of language. While the ‘two worlds model’ of language distinguishes in its various guises between speech and language, where language is ‘behind’ speech and speech becomes the actualisation of language, the ‘performance model’ of language in turn refrains from the idea that there is a ‘behind’ of language and shifts its focus instead to the ‘use’ and ‘performance’ of, e.g., ‘language games’ where ‘language games’ are conceptualised as lying in parallel. If we follow this kind of mapping of the linguistic turn, the positions of Onuf and Koskenniemi resemble rather a ‘two world model’ of language, while Kennedy and Kratochwil rather follow a ‘performance model’. The different ways the linguistic turn is taken has also repercussions on how expertise is conceptualised. Let me illustrate this by

⁸⁰² ‘It is the expert who stands between the foreground prince and the lay context, advising and informing the prince, implementing and interpreting his decisions for laymen. It is the scientists, the pollster, who interprets facts for the politician, and it is the lawyer, the administrator, who translated political decisions back into facts on the ground. Both the assertion that something is the context, and the interpretation of its consequences are the acts of experts’, David Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’, *Sydney Law Review* 27 (2005): 5; see also David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016), 110–116; and Kratochwil, *The Status of Law in World Society*, 30.

addressing three themes of the literature on the ‘politics of expertise’ in international law.

First, approaches, which are informed by a ‘two world model’ of language, are mainly interested in debunking the ‘underlying grammar’ of international legal expertise by for example by identifying the underlying ‘rules’ or the ‘deep structure’ of international legal argumentation. This is in particular the way Koskenniemi conceptualises international legal expertise.⁸⁰³ Koskenniemi explains the connection between his earlier analysis of the structure of international legal argument in *From Apology to Utopia* (and in the 1990 article on *The Politics of Law*) and the more recent interest in the politics of expertise as follow:

“The most significant addition [...] is emphasis on the *structural bias* that moves from doctrinal analysis to a discussion of institutional practices [...]. A demonstration of the lack of coherence (‘politics’) of legal argument is only a preface to the more important point that although all the official justifications of decision-making are such that they may support contrary positions or outcomes, in practice nothing is ever that random. Competent lawyers know that the world of legal practice is actually quite predictable”.⁸⁰⁴

As a result (and quoting Susan Marks), Koskenniemi points out that one should not only highlight the ‘false necessity’ in international legal argumentation, which is the result of the indeterminacy of international legal argumentation, but that there is also the danger of focussing too much on ‘false contingency’ as international legal argumentation is more structured as some fellow critical legal scholars conceptualise it.⁸⁰⁵ In order to understand Koskenniemi’s point, it is important to recognize that he emphasises the relevance of ‘grammar’ and ‘competence’ – and

⁸⁰³ I will not discuss the position of Nicholas Onuf in detail, as he does not address the question of international legal expertise explicitly. Suffice is to say that if one would take the route of Onuf’s rule-based version of constructivism in order to study international legal expertise, one would probably highlight how international legal expertise is structured by the underlying rules of international law and how one becomes an international legal expert if competent in using these rules.

⁸⁰⁴ Koskenniemi, ‘The Politics of International Law - 20 Years Later’, 9 (emphasis in the original).

⁸⁰⁵ Koskenniemi, 9; and Susan Marks, ‘False Contingency’, *Current Legal Problems* 62, no. 1 (2009): 1–21.

how both are intertwined. Following the structuralist route, Koskenniemi conceptualises 'grammar' as being about the 'deep structure' of language, i.e. what is behind speech.⁸⁰⁶ In the case of international legal argumentation the 'grammar' is the root distinction and constitutive paradox of normativity and concreteness. Now, for Koskenniemi, international legal experts are those who are 'competent' in using this 'grammar'. As Koskenniemi writes in the newly added epilogue of the 2005 edition of *From Apology to Utopia*, "[t]he politics of international law is what competent international lawyers do. And *competence is the ability to use grammar in order to generate meaning by doing things in argument*".⁸⁰⁷ In other words, one becomes an international legal expert when one knows the 'deep structure' of international law and is able to use this in legal argumentation, i.e. to oppose a rather normative argument with a rather concrete one, and vice versa. In short, competence is in Koskenniemi's account the main criterion for international legal expertise.

Second, approaches that leave the 'two worlds model' of language behind and follow instead a 'performance model' of language do not highlight competence but rather performance when they study expertise.⁸⁰⁸ A good example in this regard is David Kennedy's work on international legal expertise. As outlined in Chapter 3, Kennedy argues that we "should think about international law as a set of arguments and counter-arguments, rhetorical performances and counter-performances, deployed by people pursuing projects of various kind".⁸⁰⁹ This means for Kennedy, when it comes to study international legal expertise, that the main interest should be in "the performative dimension of expertise: expert work

⁸⁰⁶ Cf. Martti Koskenniemi, 'What Is Critical Research in International Law? Celebrating Structuralism', *Leiden Journal of International Law* 29, no. 3 (2016): 727–35.

⁸⁰⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005), 571 (emphasis in the original).

⁸⁰⁸ The distinction between competence and performance goes back to Chomski. While in Chomski's 'two world model' of language performance is a realisation of competence, 'performance models' of language do not focus on an underlying competence - as there is nothing underlying or behind - but on performance. For further discussion see Sybille Krämer, *Sprache, Sprechakt, Kommunikation: Sprachtheoretische Positionen des 20. Jahrhunderts* (Frankfurt: Suhrkamp, 2001), 52–54.

⁸⁰⁹ David Kennedy, 'Lawfare and Warfare', in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 173; similarly, Kennedy, *A World of Struggle*, 269.

constituting the space of its own work”.⁸¹⁰ To concentrate on the ‘performative dimension of expertise’ implies, for Kennedy, on the one hand, that experts are part of world-making activities.⁸¹¹ Experts have projects and these projects have in turn ‘pictures’ of how the world should be. However, different projects have different pictures. “In this sense”, Kennedy writes, “the world-making power of expertise is relational: world pictures that comprehend and shape the world and its problems are calibrated to the position people in struggle wish to occupy”.⁸¹² And, related to it, it means, on the other hand, that we should focus on expert work and the competition between different forms of expertise.⁸¹³ Kennedy further explains this, when he defines expertise as follows:

“Expertise is special knowledge made real as authority in struggle. My starting point for exploring expertise is the *work* experts do [...]. Expert work positions the people who do it between what is known and what must happen. The work is interpretive, translating the known into action and knitting the exercise of power back into the fabric of fact. One characteristic is disagreement. Experts struggle with one another using tools of interpretation, articulation, and persuasion that are, when effective, at once words and authority”.⁸¹⁴

In other words, Kennedy is mainly interested in analysing how different experts, conceived as ‘people with projects’, struggle. Yet, these struggles can be different in different fields and sites of international law. There is no common ‘grammar’ (in the structuralist sense) or ‘deep structure’ of international law as in Koskenniemi’s take. Instead, Kennedy follows his take on international law as permanently moving between different binaries, which are ontologically on the same level (see my reconstruction in Chapter 3), and proposes that in order to understand “*how* experts govern – how they develop and deploy their expertise, how they struggle and reason with one another, and how their knowledge comes to be taken up by others – we need field- and site-specific studies alongside work on patterns of

⁸¹⁰ Kennedy, *A World of Struggle*, 4.

⁸¹¹ Kennedy, chap. 3.

⁸¹² Kennedy, 90.

⁸¹³ This resembles, of course, also Andrew Abbott’s account in: Abbott, *The System of Professions*. See also my discussion above in this chapter.

⁸¹⁴ Kennedy, *A World of Struggle*, 108 (emphasis in the original).

struggle among experts and expert communities”.⁸¹⁵ The aim is consequently not to find the ‘deep structure’ of the international legal argument, but to *map* and thereby depict different forms of struggles among international legal experts.⁸¹⁶ This is of course part of the reconstructive methodology, which I outlined in Chapter 1. By producing different maps of international legal expertise, Kennedy is able to show that international legal expertise involved, for example, in struggles over war and peace differs from the one over human rights or the one over neoliberal economic development.⁸¹⁷ Expertise is never fixed, but always performed. Kennedy differs also in another aspect from the structuralist position. Although Kennedy distinguishes between background and foreground, where experts are located in the background and layman and politicians in the foreground, neither the foreground nor the background is ontologically prior. There is no hierarchy between background and foreground. Instead, background and foreground are ontologically on the same level and the linking between both becomes a *translation* between two different vocabularies. In order to study the different forms of international legal expertise, the task is now to make the background visible.⁸¹⁸ This connects, of course, perfectly with Anne Orford’s suggestion to follow Foucault and “to make visible precisely what is visible”.⁸¹⁹

Third, authors who use a ‘performance model’ of language also point to the possibility to study international legal expertise by analysing it as a ‘form of life’ and the ‘embodiment’ it involves. We have seen in Chapter 3 that Friedrich Kratochwil recently started to compare legal argumentation with learning a language, which in turn can be connected to Wittgenstein’s notion of ‘form of life’. As Kratochwil states: “Learning such a language and speaking about the world in such ways means to participate in a practice, a shared form of life, as Wittgenstein has called it. It involves reasoning but much of what goes on is more a ‘knowing how’ than just a ‘knowing what’ (namely, the rules)”.⁸²⁰ In Wittgenstein’s philosophy the concept of ‘form of life’ is central. It points to the fact that our

⁸¹⁵ Kennedy, 120.

⁸¹⁶ Kennedy, 75, 120–135.

⁸¹⁷ Kennedy, 143–147.

⁸¹⁸ Kennedy, 110–116.

⁸¹⁹ Anne Orford, ‘In Praise of Description’, *Leiden Journal of International Law* 25, no. 3 (2012): 618. See my discussion in Chapter 1.

⁸²⁰ Kratochwil, *The Status of Law in World Society*, 67.

‘language games’ are embedded in activities. Wittgenstein writes in the *Philosophical Investigations*: “Here the term ‘language-game’ is meant to bring into prominence the fact that the speaking of language is part of an activity, or of a form of life”.⁸²¹ This means that language is not only an activity but *part* of an activity.⁸²² ‘Language games’ are interlinked with nonverbal activities. Linguistic rules are then not self-explanatory but have to be embedded in practices – practices we are already familiar with; and, we are familiar, because we have been ‘trained’. Thus to focus on ‘forms of life’ opens up the possibility to study nonverbal activities and the ‘embodiment’ involved in international legal expertise.⁸²³ Anne Orford points in a study, which is inspired by Foucault, to the various ‘technologies of the self’ involved in the making of an international lawyer, in particular when it comes to the ‘embodiment’ of internationalism – an understanding of internationalism that is also the basis for experts in the various strands of ‘humanity’s law’.⁸²⁴ Most obviously, international legal experts are educated in a certain way. As Orford points out, international lawyers “through disciplinary training come to embody and internalise the foundational narratives of their discipline”.⁸²⁵ The ‘embodied and internalised foundational narratives’ of internationalism create identities of a heroic ‘self’; yet, at the same time exclude certain narratives:

“Rather than explore the centrality of international law to past and present processes of imperialism, exploitation, domination, recolonisation and elite identity formation, international law students and teachers idealise international law as a subject devoted to world order, humanitarianism, human dignity, peace and security.

⁸²¹ Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (New York: Macmillan, 1953), para. 23.

⁸²² Krämer, *Sprache, Sprechakt, Kommunikation*, 119.

⁸²³ For a link between ‘forms of life’ and ‘embodiment’ see Sybille Krämer, ‘Is There a Language “Behind” Speaking? How to Look at 20th Century Language Theory in an Alternative Way’, in *Language and World, Part Two: Signs, Minds and Actions*, ed. Volker Munz, Klaus Puhl, and Joseph Wang (Frankfurt: Ontos, 2013), 44–50.

⁸²⁴ Anne Orford, ‘Embodying Internationalism: The Making of International Lawyers’, *Australian Yearbook of International Law* 19 (1998): 1–34. Such an approach resembles, of course, also studies of David Kennedy. See, for instance: David Kennedy, ‘Spring Break’, in *Knowledges: Historical and Critical Studies in Interdisciplinarity*, ed. Ellen Messer-Davidow, David R. Shumway, and David J. Sylvan (Charlottesville: University Press of Virginia, 1993), 422–61. A good example for international criminal law is: Immi Tallgren, ‘We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court’, *Leiden Journal of International Law* 12, no. 3 (1999): 683–707.

⁸²⁵ Orford, ‘Embodying Internationalism’, 2.

International law's favourite narratives are premised upon an image of the international community as the heroic agent of progress, security, order, human rights and democracy. [...] International lawyers come to understand themselves as the embodiment of heroic internationalism, and of the values and myths that underlie international law".⁸²⁶

As this internationalist world-view is internalised by many international lawyers, it is not questioned anymore. Yet, the only question is now how to manage internationalism. International lawyers turn then into the "managerial hero [who] is a pragmatic internationalist, whose effectiveness is a result of his professionalism and managerial culture".⁸²⁷ In the end, a new role of international lawyers is created – "a role of international lawyers as pragmatic, apolitical, civilised, humane and cosmopolitan professionals, whose work is central to the march of human history and to achieving the goals of dignity, world peace, human rights, development, universal democracy and civilisation".⁸²⁸

4.4 Experts and the Politics of Legal Technicalities and Jurisdiction

Yet, the internationalist world-view of many international legal experts is not only taken for granted as it is embodied and internalized. Another important aspect of the proliferation of international legal expertise is the increasing 'technicality' of international legal argumentation. In the remainder of this chapter, I argue that in order to study the 'politics of expertise' in international law it is important to study the 'politics of technicalities'. Let me outline what I mean by 'politics of technicalities' briefly.

Thinking of fragmentation and constitutionalization as 'two sides of the same coin' implies also that the different vocabularies of international legal expertise are often highly complex; a complexity that creates then in turn a new demand for experts. As David Kennedy puts it, the "power of experts and the

⁸²⁶ Orford, 16.

⁸²⁷ Orford, 6.

⁸²⁸ Orford, 23–24.

density of law are linked”.⁸²⁹ However, according to Fleur Johns, Kennedy is not able to properly grasp the density of law properly. As Johns criticizes, the “elegant, readable essays that Kennedy has lately produced seem, in particular, to speak at too great a remove from the rather dense, self-referential practices of international legal technique”.⁸³⁰ Put differently, the density of law is essentially a product of the *technical* dimension of law. This means that today often a certain task - and the related project - is usually framed and embedded to a large extent in highly technical idioms of law. One consequence of this development is that sometimes situations are created where not only lay people but even legal professionals specialised in other sub-fields of law are not able to participate successfully in legal communication anymore.⁸³¹ The idea to study the technical side of law, i.e. how law itself is (becoming) a highly technical idiom that can only be mastered by a limited group of experts, has been popularized by Annelise Riles in her work on the “technicalities” of law.⁸³² Although to study law as a technicality might seem at first sight, as Riles admits, “mundane and inherently uninteresting”, it facilitates however to uncover how the politics of (international) legal expertise actually work.⁸³³ It is a way of ‘opening the black box’ of law and look into the unfolding fabric; it helps us to find “important overlooked practices and rationalities that have significant effects”;⁸³⁴ and, by doing so, it enables us to uncover the hidden politics of expert works. As Marieke de Goede and Gavin Sullivan observe in their study of the politics of security lists, “[t]echnicality does not so much dissolve

⁸²⁹ Kennedy, *Of War and Law*, 25.

⁸³⁰ Johns, *Non-Legality in International Law*, 18.

⁸³¹ For a general overview of how in international law the ‘technical’, expertise, managerialism and fragmentation hang together, see Koskenniemi, ‘The Fate of Public International Law’, 1–2; Koskenniemi, ‘Miserable Comforters’, 414; and Leander and Aalberts, ‘The Co-Constitution of Legal Expertise and International Security’. See also the case study on constitution-making by Sara Kendall, “Constitutional Technicity”: Displacing Politics through Expert Knowledge’, *Law, Culture and the Humanities* 11, no. 3 (2015): 363–77.

⁸³² Annelise Riles, ‘A New Agenda for the Cultural Study of Law: Taking on the Technicalities’, *Buffalo Law Review* 53 (2005): 973–1033. For a contextualisation of this approach within the different strands of socio-legal studies see Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press, 2011), 14–20.

⁸³³ Riles, ‘A New Agenda for the Cultural Study of Law’, 974; see also Riles, *Collateral Knowledge*, 64–70.

⁸³⁴ Marie-Eve Sylvestre et al., ‘Spatial Tactics in Criminal Courts and the Politics of Legal Technicalities: Spatial Tactics in Criminal Courts’, *Antipode* 47, no. 5 (2015): 1350. On ‘blackboxing’ see Bruno Latour, *Pandora’s Hope: Essays on the Reality of Science Studies* (Cambridge: Harvard University Press, 1999), 304. See also my discussion of ANT earlier in this chapter.

political questions [...], however, it buries such questions within registers of expertise".⁸³⁵

Furthermore, in order to scrutinize the 'technical character of law' it is helpful to assemble a couple of threads of the preceding and upcoming discussions. As Riles argues, to study legal technicalities would shed light to "ideologies" of "legal instrumentalism and managerialism"; to "actors" such as "the scholars and practitioners who treat the law as a tool or machine and who see themselves as modest but expertly devoted technicians"; to a distinct "problem solving paradigm" understood as "the orientation toward defining concrete, practical problems and toward crafting solutions"; and, finally, to "the *form* of technical legal doctrine and argumentation" itself, which is then encompassed in a "*technical aesthetics of law*".⁸³⁶ In other words, the "focus is on the resources, mechanisms and knowledge structures that legal practitioners deploy in order to make sense of their world".⁸³⁷ For Riles the technical dimension of law should also be conceived as performative as we should "account for the *agency of technocratic legal form*".⁸³⁸ Furthermore, to present a specific issue as something technical in legal terms is already a political project. And finally, it is interesting to note – as it touches upon one of the key terms of this study – that Riles started to turn to the 'technicalities of law' vis-à-vis the literature of the 'conflict of laws', i.e. the field of law, which is also known as private international law. The conflict of laws literature is interesting as it is the strand of law that deals mainly with questions of *jurisdiction* by determining, which legal system and what kind of law should regulate disputes with multi-jurisdictional elements.⁸³⁹ Although I will not pay much attention to questions of jurisdiction in private law, the following three chapters are located in the intersection of jurisdiction and international legal expertise – and the different

⁸³⁵ Marieke de Goede and Gavin Sullivan, 'The Politics of Security Lists', *Environment and Planning D: Society and Space* 34, no. 1 (2016): 82.

⁸³⁶ Riles, 'A New Agenda for the Cultural Study of Law', 976.

⁸³⁷ Sylvestre et al., 'Spatial Tactics in Criminal Courts and the Politics of Legal Technicalities', 1349.

⁸³⁸ Riles, 'A New Agenda for the Cultural Study of Law', 980.

⁸³⁹ Riles, 976; see also Mariana Valverde, 'Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory', *Social & Legal Studies* 18, no. 2 (2009): 139–57; similarly Sundhya Pahuja speaks of "technical" practices' in the context of 'jurisdictional encounters', Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', *London Review of International Law* 1, no. 1 (2013): 65.

legal and non-legal technicalities (e.g., interpretative techniques; but also the use of lists and legal indicators) involved in it.⁸⁴⁰

5. Conclusion

The aim of this chapter was to situate this thesis in larger recent debates on the ‘politics of expertise’ among critical scholars in IR and IL. As we have seen at the outset of this chapter, international legal experts play an important role in more and more fields and sites of the ‘international’. Yet, as this chapter argued the question of expertise is hardly new for students of the ‘international’. Therefore, the chapter reconstructed first larger academic debates and scholarly projects in the history of the two disciplines – the interwar attempts to describe the League of Nations as a body of expertise, functionalist and neo-functionalist approaches and, finally, Schachter’s ‘invisible college of international lawyers’. These literatures pictured the ‘international’ either in terms of ‘international organization’ or ‘global governance’ and link thus to my earlier discussion in Chapter 2. Moreover, these literatures clearly separate politics and expertise and, consequently, knowledge and power. In order to challenge this view, I introduced recent streams of social theory which problematize such a separation between politics and expertise – and conceptualise legal knowledge as a distinct form of expertise: Abbott’s ‘system of professions’, Bourdieu’s ‘juridical field’ as well as recent contributions in STS/ANT. Finally, I turned to critical scholarship in IR and IL and how it conceptualises the ‘politics of expertise’ in international law. This literature situates the ‘politics of expertise’ in international law within broader – and often intersecting – transformations of international law, which run under the labels ‘managerialism’, ‘fragmentation’ and ‘constitutionalisation’. Although the various streams of critical scholarship share the observation that these transformations

⁸⁴⁰ Although positivist accounts treat international law usually as part of general jurisprudence it was, for instance, Hersch Lauterpacht, who made early (in his PhD thesis) a strong argument in favour of treating international law more like private law as both private law and international law are about governing the relations between equals - something where questions of jurisdiction become paramount. See Hersch Lauterpacht, ‘Private Law Analogies in International Law with Special Reference to International Arbitration’ (The London School of Economics and Political Science, 1926). See also my discussion of Lauterpacht in Chapter 6. For an argument regarding the ‘remarkable overlap’ of European tort law and international responsibility in international law, see André Nollkaemper, ‘Constitutionalization and the Unity of the Law of International Responsibility’, *Indiana Journal of Global Legal Studies* 16, no. 2 (2009): 543.

are somehow happening and that we are witnessing a turn to expertise in international law, they nevertheless conceptualise, problematize and theorize the 'politics of expertise' in different ways. As I have argued, the differences among critical scholars can be attributed to the different ways they take the linguistic turn, which I discussed at the end of Chapter 3. While authors, who rely on a 'two world model' of language foreground 'competence' when it comes to evaluate international legal expertise, proponents of a 'performance model' of language emphasise the 'performativity' of expert work. Moreover, the latter highlight that international legal expertise is embedded in a certain 'form of life' and is connected to practices of 'embodiment'. Last but not least, I argued that to study the 'politics of expertise' in international law by turning to 'legal technicalities' could be a promising avenue as it could help to 'open several black boxes', including the one of jurisdiction. The next three chapters will reconstruct the politics of jurisdiction in international law and how experts are involved in the boundary work of jurisdiction. While the next chapter focuses on conceptual and historical aspects of jurisdiction, Chapter 6 and Chapter 7 turn to an analysis of the politics of jurisdiction in the context of an emerging 'humanity's law'.

Chapter 5: The Concept of Jurisdiction: Between Territoriality and Universality

“The logic of government is the logic of jurisdiction – question it and all that is solid melts into air”⁸⁴¹

1. Introduction

On 27 May 2013, the Ethiopian Prime Minister and then-Chairman of the African Union (AU) Hailemariam Dessaglegn found harsh words at the closing press conference of the 21st AU Summit in Addis Ababa in order to criticise the International Criminal Court (ICC):

“African countries came to a consensus that the process the ICC conducted in Africa has a flaw. The intention was to avoid any form of impunity and ill governance and crime, but now the process has degenerated into some kind of race hunting”.⁸⁴²

The origin of Dessaglegn’s accusations was the circumstance that at the time of the statement the ICC had started – as the ICC calls it – ‘preliminary investigations’, ‘situations under investigation’ and ‘cases’ only where African countries were involved. For Dessaglegn this was already sign enough to claim that the ICC was conducting ‘some kind of race hunting’ on the African continent. These accusations were backed further by an official statement, also dated on the 27 March 2013, of the AU Assembly of Heads and States of Government (AU Assembly). The statement, while more ‘diplomatically’ in its formulations, backed its Chairman’s position substantively as it stressed “the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard, in conformity with the principles of international law”.⁸⁴³

⁸⁴¹ Richard T. Ford, ‘Law’s Territory (A History of Jurisdiction)’, *Michigan Law Review* 97, no. 4 (1999): 851.

⁸⁴² Solomon Dersso, ‘The International Criminal Court’s African Problem’, *Al Jazeera*, 11 June 2013.

⁸⁴³ African Union, ‘Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)’, Doc. Assembly/AU/13(XXI) (2013).

Both statements were triggered by the attempt of the ICC to bring Uhuru Kenyatta and William Ruto, President and Deputy-President of the Republic of Kenya respectively, as well as other leading politicians of the East African country to trial in The Hague for the alleged conduct of crimes against humanity. They were accused of having committed these crimes between December 2007 and February 2008 in the context of post-election violence with at least 1,100 killed, thousands injured and 660,000 of displaced people.⁸⁴⁴ The aim of the AU was not to drop the indictment against Kenyatta and the other politicians accused. And in fact, Kenyatta himself had cooperated with the ICC so far – may it be out of strategic calculations to avoid an arrest warrant from the ICC and not because he considered the ICC as the legitimate institution to deal with his case. In any case, what matters was the AU's claim to refer the ICC's investigations and prosecutions, as it was put, "pursuant with the principle of complementarity enshrined in the Rome Statute of the ICC" back to a domestic Kenyan court

"to allow for a National Mechanism to prosecute and investigate the case under a reformed Judiciary provided for in the new constitutional dispensation, in support of the on-going peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence in Kenya".⁸⁴⁵

The Addis Ababa episode was only one of the most recent peaks of what one observer coined the "International Criminal Court's African problem":⁸⁴⁶ a series of serious attacks by leading African politicians against the court in The Hague in particular and international criminal law and justice more generally.⁸⁴⁷ The core of these accusations was not limited to the point that the ICC was too selective in its operations as it mostly targeted African countries and investigated African

⁸⁴⁴ Cf. Amnesty International, 'Crying for Justice: Victims' Perspectives on Justice for the Post-Election Violence in Kenya' (London: Amnesty International, 2014).

⁸⁴⁵ African Union, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC).

⁸⁴⁶ Dersso, 'The International Criminal Court's African Problem'.

⁸⁴⁷ Cf. African Union, 'Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction', Doc. Assembly/AU/14(XI) (2008); African Union, 'Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction', Doc. Assembly/AU/3(XII) (2009); and African Union, 'Decision on the Abuse of the Principle of Universal Jurisdiction', Doc. Assembly/AU/11(XIII) (2009).

politicians, but the claims contained also that the actions of the ICC reflect the distribution of power in world politics and that, in the end, the ICC should be perceived as a political instrument of either – here the interpretations of the various observers varied – the United Nation’s Security Council, the European Union or Western countries in general.

Yet, a second view reveals that these claims are everything but new. For example, the ICC has been called previously already the “European Court of African Affairs” due to the selection of cases and as the ICC reflects an European project – both in its intellectual as well as in its political origins.⁸⁴⁸ And, furthermore, since the emergence of international criminal justice and adjudication – something which might have occurred during the early and mid-twentieth century – several authors argued over and over again that international penal courts and tribunals are political courts realizing some kind of ‘victor’s justice’ and pursuing political trials – although the term ‘political’ is used here in different ways by different authors.⁸⁴⁹ In this context, Gerry Simpson remark that international criminal trials and tribunals can also be seen as “trials of the ‘political’ or, at least, indictments of the political” is important.⁸⁵⁰

⁸⁴⁸ Sarah Nouwen, ‘The International Criminal Court: A Peacebuilder in Africa?’, in *Peacebuilding, Power, and Politics in Africa*, ed. Devon Curtis and Gwinyayi A. Dzinesa (Athens: Ohio University Press, 2012), 172; David Hoile, a controversial Sudan-based British scholar was even more drastic in his opinion of the ICC: ‘The ICC in reality is not an international court; basically, it’s a European court. Most of the world population is not covered in the ICC. China is not there, the US is not there, Russia is not there, so the ICC is in essence a European court: European funded, European jury, European directed’, David Hoile, ‘ICC Is a Political Arm of Europe in Africa’, *The Ethiopian Reporter*, 19 October 2013.

⁸⁴⁹ Compare, for instance, early Georg Schwarzenberger, ‘The Problem of an International Criminal Court’, *Current Legal Problems* 3 (1950): 263–96; later Otto Kirchheim, *Political Justice* (Princeton: Princeton University Press, 1961); and Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986); recently Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), chap. 1; and Danilo Zolo, *Victors’ Justice: From Nuremberg to Baghdad* (London: Verso, 2009); see also the exchange between Sarah Nouwen and Wouter Werner on the one hand and Bas Schotel on the other: Sarah M. H. Nouwen and Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, *European Journal of International Law* 21, no. 4 (2011): 941–65; Bas Schotel, ‘Doing Justice to the Political. The International Criminal Court in Uganda and Sudan: A Reply to Sarah Nouwen and Wouter Werner’, *European Journal of International Law* 22, no. 4 (2011): 1153–60; and S. M. H. Nouwen and W. G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Rejoinder to Bas Schotel’, *European Journal of International Law* 22, no. 4 (2011): 1161–64.

⁸⁵⁰ Simpson, *Law, War and Crime*, 13.

But let us turn again to the conflict between the ICC and the AU: Similar allegations, namely of being partial and political, were rejected already earlier by the ICC. The Court's self-imaginary could be paraphrased as "to stay clear of politics, to subordinate politics to law, and to speak law to power".⁸⁵¹ *Law and politics are thus conceptualised as opposites*: the biggest anxiety of the ICC, it seems, is to be contained with politics. With this in mind it does not surprise that the ICC's first reaction after the AU summit in May was framed exactly in this vernacular. On 29 May 2013, only two days after Dessaglegn's statement, the presidency of the ICC did something rather unusual as it issued a press release, where the court assured that the

"ICC operates strictly within the mandate and legal framework by the Rome Statute [...] and cannot take political factors into account. Decisions are taken independently on the basis of the law and the available evidence and are not based on regional or ethical considerations".⁸⁵²

Furthermore, the Court addressed the question of complementarity by claiming that the

"ICC does not replace national *jurisdictions*; it only complements them when necessary. The Rome Statute defines the criteria for deciding whether a case should be tried before the ICC or in a national judicial system, and this determination is made through a judicial process of independent judges of the ICC".⁸⁵³

Although the ICC's position appears, when we read these statements, to be set in stone, it seems however that we are witnessing some changes on a longer run as the ICC has recently widened its area of operation and conducted since 2013 preliminary examinations with regard to Afghanistan, Colombia, Iraq, Palestine,

⁸⁵¹ Nouwen and Werner, 'Doing Justice to the Political', 2011, 492; Gerry Simpson observes this tendency for international criminal courts and tribunals more generally: 'Ideally, the trial is a place liberated from politics and the contamination politics threatens', Simpson, *Law, War and Crime*, 11.

⁸⁵² International Criminal Court (ICC), 'ICC Underlines Impartiality, Reiterates Commitment to Cooperation with the African Union', ICC-CPI-20130529-PR908 (2013).

⁸⁵³ International Criminal Court (ICC) (emphasis added).

the Philippine⁸⁵⁴, the vessel 'Mavi Marmara'⁸⁵⁵, Cambodia, Ukraine and Venezuela as well as it has currently Georgia as a situation under investigation. Although the ten remaining situations under investigations and all 24 cases, which are currently adjudicated before the Court, concern African countries, one can at least concede that the ICC has started to widen its scope. In a similarly ambivalent fashion, the investigations against Kenyatta were, on the one hand, dropped in December 2014 while, on the other hand, the investigations against Ruto and others still continue. At the same time, however, the AU has not disarmed its rather dismissive position towards the ICC as it threatened in January 2016 that African countries could withdraw from the Rome Statute and, consequently, leave the Court's jurisdiction.⁸⁵⁶

Yet, by providing this empirical example it was not intended to open up, for instance, an at-large discussion of the post-colonial implications of the international criminal justice regime in particular⁸⁵⁷ or 'the racial origins of international law' more generally;⁸⁵⁸ it was also not intended to point in the opposite direction and argue that the open hostilities of (some) leading African politicians were less about the discrimination of Africans before the ICC as they rather signified an attempt of autocratic rulers like the Sudanese head of state

⁸⁵⁴ As a reaction on the preliminary examinations the Philippines announced on 19 March 2018 to leave the jurisdiction of the ICC. However, the ICC reaffirmed that it will continue its preliminary examinations. The ICC's press release states: 'Should, at the conclusion of the preliminary examination process, the Prosecutor decide to proceed with an investigation, authorisation from a Pre-Trial Chamber of the Court would be required. The Court's judges would then make an independent assessment as to whether the statutory criteria for the opening of an investigation are met', International Criminal Court (ICC), 'ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law', CC-CPI-20180320-PR1371 (2018).

⁸⁵⁵ The vessel is also known as part of the 'Gaza Freedom Flotilla'. It operated under the flag of the Comoros Island.

⁸⁵⁶ See 'African Union Members Back Kenyan Plan to Leave ICC', *The Guardian*, 1 February 2016.

⁸⁵⁷ For a comprehensive overview of different critical, postcolonialism being one of them, perspectives towards international criminal law, see Frédéric Mégret, 'International Criminal Justice: A Critical Research Agenda', in *Critical Approaches to International Criminal Law: An Introduction*, ed. Christine Schwöbel (Abingdon, Oxon: Routledge, 2014), 17–53; see also Nouwen, 'The International Criminal Court: A Peacebuilder in Africa?'

⁸⁵⁸ For a recent statement with regard to IL, see Martti Koskeniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science', *European Journal of International Law* 27, no. 2 (2016): 415–29; for a similar discussion in IR, see Robert Vitalis, 'The Graceful and Generous Liberal Gesture: Making Racism Invisible in American International Relations', *Millennium* 29, no. 2 (2000): 331–56.

Omar al-Bashir to get ‘immunity from impunity’;⁸⁵⁹ and finally, it was not intended to start a debate about the ‘catalysing’ effect of the ICC on national justice systems, i.e. whether national courts and judges change their behaviour due to the (indirect) pressure generated by the possibility of an adjudication of international crimes before international criminal courts and tribunals.⁸⁶⁰ Instead, the aim of providing this introductory example was to take up the thread of the preceding chapter and to show how politics and legal technicality are intertwined. They are intertwined as the conflict between the AU Assembly and the ICC represents a conflict about a rather technical legal issue: the issue of *jurisdiction*.

Let me just briefly elaborate on this. The conflict between the ICC and the AU was *in nuce* about the question of who (should) judge(s) (*quis judicabit*) Kenyatta and the other Kenyan politicians – whether it should be a national Kenyan court or the ICC. Typically this is a question of jurisdiction and in the context of the ICC a question of ‘complementarity’. If we take a look at the Rome Statute of the ICC, Article 17 on ‘Issues of admissibility’ is particularly relevant for our purpose. To get a better picture, it is worth to quote the whole, rather long, Article:

“1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

⁸⁵⁹ Amnesty International, ‘Impunity vs Immunity: Africa and the ICC’, *Amnesty International* (blog), 24 June 2015.

⁸⁶⁰ For an in-depth analysis, see Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".⁸⁶¹

Article 17 addresses the issue of jurisdiction vis-à-vis the principle of complementarity. When we read this article, we may gain the impression that the

⁸⁶¹ International Criminal Court (ICC), 'Rome Statute of the International Criminal Court', A/CONF.189/9 (1998), para. 17.

idea of complementarity is stated quite clearly and questions of jurisdiction are merely procedural – complementarity is as technical as possible as it works as a ‘trigger’ or a ‘mechanism’. This line of argumentation was repeatedly emphasised by the ICC and provided an important source of legitimacy for the international criminal justice regime as a whole: it provided legitimacy through procedures.⁸⁶² As, for example, Sarah Nouwen pointed out, “[l]egally, ‘complementarity’ is a technical term of art for a priority rule set out in article 17 of the Rome Statute”.⁸⁶³ But, according to Nouwen, this is not the full story as complementarity is also about the ‘belonging’ and ‘possession’ of crimes – whether certain crimes ‘belong’ or are ‘possessed’ by states (equated with power politics) or by international courts and tribunals (considered as trials of humanity).⁸⁶⁴ These are, however, questions, which cannot simply be resolved by imposing more legal rules as these questions deal with fundamental tensions and paradoxes. Nouwen suggests here that the ICC should not try to “find a super-guardian to guard the guardians” and answer the perennial question of who judges the judges (*quis custodiet ipsos custodies*).⁸⁶⁵ Instead, Nouwen suggests that the ICC should “take the political reality as its explicit starting point” and acknowledge that the involved tensions and paradoxes cannot be solved from within the law.⁸⁶⁶ Such a reading of complementarity points thus to the politics involved in discussions of complementarity and, more generally, of jurisdiction. This position goes hand in hand with the reading of jurisdiction, which I suggest in this chapter. It is a reading which advocates the idea that technical-legal issues with regard to the jurisdiction of, for example, the ICC involve important questions, which, although formulated in a formalistic-legalistic vocabulary, are rather situated in the intersection of international law and politics than being solely of technical-legal nature.

⁸⁶² See for an in-depth discussion of the relationship of legitimacy/legitimation and procedures, Niklas Luhmann, *Legitimation durch Verfahren* (Neuwied am Rhein: Luchterhand, 1969).

⁸⁶³ Nouwen, *Complementarity in the Line of Fire*, 14.

⁸⁶⁴ See Nouwen, 14–21.

⁸⁶⁵ Nouwen, 403.

⁸⁶⁶ Nouwen, 403. Of course, in this regard one of the characteristics of (international criminal) law becomes central, namely that law usually ends endless theoretical discussions by presenting a decision. For instance, in the case of Kenyatta Pre-Trial Chamber II of the ICC, consisting of three judges, decided (with Judge Hans-Peter Kaul presenting a Dissenting Opinion) to open up investigations against Kenyatta, International Criminal Court (ICC), Pre-Trial Chamber II, ‘Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali’, ICC-01/09-02/11-1 (2011).

This chapter aims thus to get a better grip on the concept of jurisdiction. Jurisdiction is, as we have seen for instance in the ICC's statement, commonly perceived as a highly technical-legal term – as we have seen towards the end of the preceding chapter it is the prime example for Annelise Riles when she speaks of 'legal technicalities' – and almost conceptualised as a brute fact or independent object in a world out there. In contrast to this traditional view, I will however argue that jurisdiction should be perceived as a social and political practice, which has strong repercussions on how authority and power are distributed in global politics and how order is formed, maintained and contested. Questions of jurisdiction are thus highly political. And questions of jurisdiction come with different *projects*. For instance, if we look at the history of jurisdiction, questions of jurisdiction emerged in the transition from medieval to early modern Europe. In this period claims of *universal* jurisdiction, which were propagated by Pope and Emperor, were opposed by other rulers through the invocation of the notion of *territorial* jurisdiction, which became then an important criterion of the modern sovereign state. Subsequent to this shift, the world could be conceptualised as divided into different states each having exclusive jurisdiction over their 'own' territory – the 'modern international' was born. Classic international law (as well as modern world politics) is built upon the idea of territorial jurisdiction and its corollary of state sovereignty as it is concerned to guide (and rule) the conduct between sovereign states. However, the dominance of the paradigm of territorial jurisdiction became explicitly contested in recent times. Here, international criminal law as well as the other strands of an emerging 'Humanity's Law' are among the main challenge(r)s of this logic as they seem to (re)introduce the idea(l) of universal jurisdiction. The invocation of 'Humanity's Law' and its consequences will be the subject of the last two substantial chapters of this thesis. Before I address this, let me problematize and theorize, first – in this chapter –, the concept of jurisdiction.

In order to crack open the concept of jurisdiction, this chapter will pursue two strategies. As a first strategy, I will introduce in the next section (2.) recent literatures, which – although coming from different theoretical angles – challenge traditional notions of jurisdiction and conceptualise jurisdiction as a social and political practice. Following this 'synchronic' reading, I will pursue a second

strategy – a ‘diachronic’ reading of the concept – and historicise the concept in section 3.⁸⁶⁷ I will start this historical inquiry of the concept of jurisdiction by focussing on the transition from medieval to early modern Europe and end with the concept’s modern enunciation in classic international legal positivism. Yet, let me note an important caveat, here. The historical reconstruction of the use and function of the concept is not intended to provide an all-encompassing history of jurisdiction as it rather aims to show how the uses of the concept changed over time and, thus, to point to the (historical) contingency of today’s concept(s) of jurisdiction. For instance, as I focus mainly on the European context, non-European developments and, in particular, the jurisgenerative function of encounters between Europeans and non-Europeans remains certainly understudied in this chapter.⁸⁶⁸ Nevertheless, and put more generally, to reflect upon both the synchronic and diachronic uses of the concept, i.e. to reconstruct its grammar (in a Wittgensteinian sense), will help me in the remaining chapters to ‘re-situate’ and ‘free’ the concept from different traditional constraints, such as its link to exclusive territoriality or the idea that questions of jurisdiction are a-political as they are part of a neutral legal-technical domain. This will set then the tone for upcoming discussions regarding the politics of expertise and legal technicalities as politics of jurisdictional projects.

⁸⁶⁷ The idea to distinguish between a synchronic and a diachronic reading is, of course, rooted in Ferdinand de Saussure, *Course in General Linguistics* (New York: Columbia University Press, 2011), pt. 2 and 3. However, in contrast to Ferdinand de Saussure’s structural linguistic, which equates the synchronic with the static and the diachronic with evolution, I argue that both – the synchronic and the diachronic – are dynamic (and usually intertwined).

⁸⁶⁸ On the jurisgenerative function of encounters and how encounters actually created international law, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004). For a similar argument with regard to cartography, see Ricardo Padrón, *The Spacious Word: Cartography, Literature, and Empire in Early Modern Spain* (Chicago: The University of Chicago Press, 2004).

2. Jurisdiction as Social and Political Practice

This section will challenge traditional notions of jurisdiction, which conceptualise the term as *neutral, technical and a-political*.⁸⁶⁹ One consequence of treating the concept of jurisdiction as a technicality is the fact that there are only very few contributions, which actually *theorize* and *problematize* the concept in itself. This is even more surprising as jurisdiction is a central concept in all branches of law.⁸⁷⁰ The mainstream literature on jurisdiction usually limits itself to an opening statement about the etymological origins of the concept – something like: the concept of jurisdiction derives from two Latin terms, the noun *ius* (sometimes also written *jus*), meaning ‘law’, and the verb *dicere*, meaning ‘to speak’.⁸⁷¹ Jurisdiction is thus usually translated as the authority to speak the law.⁸⁷² Furthermore, what is often included in international legal contributions is an enumeration of different ‘categories’ (e.g., prescriptive, enforcement or judicial jurisdiction) and ‘principles’ (e.g., nationality, territoriality or universality) of jurisdiction, which should help to delimit different jurisdictional orders. What remains missing, however, is how these categories and principles actually came into being or how they are linked to more general legal and political *problematisques*. In short, a genuine theoretical debate with regard to the concept of jurisdiction is still missing.⁸⁷³

⁸⁶⁹ Of course, such accounts often do not exist in a ‘pure’ form. But, in order to get a better picture of traditional accounts of jurisdiction, see, for example, Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015); Christopher Staker, ‘Jurisdiction’, in *International Law*, ed. Malcom D. Evans, 4th ed. (Oxford: Oxford University Press, 2014), 309–35; and, Bruno Simma and Andreas Th. Müller, ‘Exercise and Limits of Jurisdiction’, in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 134–57; for an overview in international criminal law, see Antonio Cassese et al., *Cassese’s International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), chap. 14–17.

⁸⁷⁰ For a similar complaint see Shaunnagh Dorsett and Shaun McVeigh, ‘Questions of Jurisdictions’, in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon: Routledge Cavendish, 2007), 3.

⁸⁷¹ ‘Juristouching’ and ‘Jurismorphing’, two terms, which I discussed in the previous chapter, have similar etymological roots and also point to the process of transforming something into a legal issue. It is also interesting to note that the Latin word *iudex*, which means judge, has exactly the same etymological roots as jurisdiction (i.e. ‘*ius*’ and ‘*dicere*’), Emile Benveniste, *Indo-European Language and Society* (London: Faber and Faber, 1973), 392; cf. Dorsett and McVeigh, ‘Questions of Jurisdictions’, 3; and Asha Kaushal, ‘The Politics of Jurisdiction’, *The Modern Law Review* 78, no. 5 (2015): 761.

⁸⁷² It is noteworthy here that even the link to the concept of authority was not enough to treat jurisdiction as a concept with social and political relevance.

⁸⁷³ Gregor Noll, ‘Theorizing Jurisdiction’, in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 602–603.

On the other hand, more critical approaches remained for a long time silence(d) with regard to the concept of jurisdiction as well. This may be due to the fact that the critical literature – with all its twists and turns – gave much more attention to jurisdiction’s adjacent concept, the concept of *sovereignty*. Surely, this is not to say that there has not been done valuable work with regard to the concept of sovereignty – quite the opposite is the case, as theorizing and problematizing sovereignty was one of the major hubs for critical thinking in both IR and IL – but it means that the focus on sovereignty made the concept of jurisdiction somehow ‘invisible’ for the purpose of analysis.⁸⁷⁴ This tendency was further aggravated, as even in critical studies the notion of sovereignty was associated with the ‘political’ and theory in general while jurisdiction on the other hand with legal formalism and subsequently treated as a technical aspect of practicing law.⁸⁷⁵ Moreover, as Bradin Cormack notes, “excluding jurisdiction as a contributing term, has made sovereignty more stable as it is”.⁸⁷⁶ Yet, against all odds, we can observe more recently a “nascent field of jurisdictional studies”, which started to reconstruct, theorize and problematize the concept in various (legal) fields and does so from a variety of critical perspectives.⁸⁷⁷ What is common to these accounts is that they do not treat jurisdiction as a neutral, technical and a-political term anymore but rather understand jurisdiction as a *social and political practice*. Importantly, this

⁸⁷⁴ The critical literature on sovereignty is extensive and cannot be captured in a sole footnote. But see, for example, Tanja E. Aalberts, *Constructing Sovereignty between Politics and Law* (London: Routledge, 2012); Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen, eds., *Sovereignty Games* (New York: Palgrave Macmillan, 2008); Antony Anghie, ‘Rethinking Sovereignty in International Law’, *Annual Review of Law and Social Science* 5, no. 1 (2009): 291–310; Richard K. Ashley, ‘Untying the Sovereign State: A Double Reading of the Anarchy Problematique’, *Millennium - Journal of International Studies* 17, no. 2 (1988): 227–62; Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995); Jens Bartelson, *Sovereignty as Symbolic Form* (Abingdon: Routledge, 2014); Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996); Friedrich Kratochwil, ‘Sovereignty as “Dominium”: Is There a Right to Humanitarian Intervention?’, in *Beyond Westphalia? National Sovereignty and International Intervention*, ed. Michael Mastanduno and Gene Lyons (Baltimore: John Hopkins University Press, 1995), 21–42; Nicholas Onuf, ‘Sovereignty: Outline of a Conceptual History’, *Alternatives* 16 (1991): 425–46; Cynthia Weber, *Simulating Sovereignty: Intervention, the State, and Symbolic Exchange* (Cambridge: Cambridge University Press, 1995); and Wouter Werner and Jaap de Wilde, ‘The Endurance of Sovereignty’, *European Journal of International Relations* 7, no. 3 (2001): 283–313.

⁸⁷⁵ For a similar claim, see Kaushal, ‘The Politics of Jurisdiction’, 763.

⁸⁷⁶ Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625* (Chicago: The University of Chicago Press, 2007), 9.

⁸⁷⁷ Kaushal, ‘The Politics of Jurisdiction’, 759. Kaushal’s article presents an excellent overview of a number of recent developments in critical legal contributions to jurisdiction; . The chapters of the following collection of essay point in the same direction: Shaun McVeigh, *Jurisprudence of Jurisdiction* (Abingdon: Routledge Cavendish, 2007); see also the monograph by Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012). For a recent reconstruction of jurisdiction with a focus on international law, see, for example, Noll, ‘Theorizing Jurisdiction’.

emphasises the dynamics and contingency (indeterminacy) of law and, thus, the politics of law within legal language itself.⁸⁷⁸ In what follows now, I will reconstruct a number of these more recent attempts: which conceptualise jurisdiction as a social practice (2.1); embedded questions of jurisdiction within discussions in legal and political theory (2.2); point to the spatio-temporal fixes of jurisdiction (2.3); and link it to the literature on legal pluralism and postmodern concepts of law (2.4)

2.1 Jurisdiction as social practice: Ford

A good starting point to problematize and theorize jurisdiction is Richard T. Ford's now seminal article on *Law's Territory*.⁸⁷⁹ Ford's article deals with a specific form of jurisdiction – *territorial* jurisdiction – and refers in its examples mainly to the sub-national level of the United States. Nevertheless, the article is helpful for our purpose as it tackles various conceptual puzzles of jurisdiction and – I will come back to this issue in the next section of this chapter – provides an extensive reconstruction of the concept's history as well. Coming from a CLS-plus-Foucault-inspired background, Ford argues that we should perceive jurisdiction not “solely in terms of material/spatial attributes, as if it were simply an object or a built structure” but “also [as] a discourse, a way of speaking and understanding the social world”.⁸⁸⁰ In other words, jurisdiction has a material as well as a discursive dimension and it is important to study both in conjunction in order to understand their interplay. In order to bring discourse and materiality together it is, according to Ford, fundamental to think of “territorial jurisdiction as a set of social practices, a code of etiquette”. As such, it must “be learned and communicated to others”.⁸⁸¹

This process of learning and communicating works mostly through maps and other forms of graphic representation. In this context, Ford compares the

⁸⁷⁸ Cf. Cormack, *A Power to Do Justice*, 2.

⁸⁷⁹ Ford, ‘Law's Territory’; for recent discussions of Ford's article in the intersection of IR and IL, see Philip Liste, ‘Transnational Human Rights Litigation and Territorialized Knowledge: *Kiobel* and the “Politics of Space”’, *Transnational Legal Theory* 5, no. 1 (2014): 1–19; and Anne Orford, ‘Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect’, *Michigan Journal of International Law* 30 (2009): 981–1015.

⁸⁸⁰ Ford, ‘Law's Territory’, 855.

⁸⁸¹ Ford, 855.

practice of jurisdiction with the practice of dancing the Tango: on the one hand, we learn to dance the Tango by looking at graphic descriptions such as diagrams where the steps are mapped; on the other hand, however, these graphic descriptions produce material consequences as people are actually moving according to them. With regard to jurisdiction this works in a similar way as

“jurisdiction is a function of its graphical and verbal descriptions; it is a set of practices that are performed by individuals and groups who learn to ‘dance the jurisdiction’ by reading descriptions of jurisdictions and by looking at maps. This does not mean that jurisdiction is ‘mere ideology’, that the lines between various nations, cities and districts ‘aren’t real.’ Of course the lines are real, but they are real because they are constantly being *made* real, by county assessors levying property taxes, by police pounding to beat (and stopping at the city limits), by registrars of voters checking identification for proof of residence. Without these practices the lines would not ‘be real’ – the lines don’t pre-exist the practices”.⁸⁸²

Consequently, jurisdiction is in itself a practice and not only a space – the jurisdictional space – in which practices can be performed; and, as such the boundaries of the jurisdictional space are open to change. If we return to the example of the Tango, we can further see how the practice of the Tango ascribes certain roles to individuals – for instance, dancing the Tango involves two ‘subjectivities’ – a ‘man’ and a ‘woman’ – and a hierarchical relationship between these subjectivities – while the ‘man’ leads, the ‘women’ follows. The categories of ‘man’ and ‘woman’, and the roles that are ascribed to these categories, do not pre-exist its social infabrication but dancing the Tango is one of “hundreds of social practices [which] construct these gendered roles and encourage people to conform to them”. If repeated over time this kind of “conformity will become ‘second nature’”.⁸⁸³ Here again, jurisdiction works in an analogous way as it “constructs *legal* statuses” and, as Ford points out, “when we perform these jurisdictional roles they too become ‘second nature.’ But this type of ‘second nature’ is the product of

⁸⁸² Ford, 856 (emphasis in the original).

⁸⁸³ Ford, 857.

social practices that are enforced by social custom and, more importantly, by law”.⁸⁸⁴

Insisting on the performative and productive dimension of jurisdiction, i.e. how jurisdiction constructs for example legal statuses (and not only offers a ‘neutral’ description of facts out there and a mechanism of subsumption for these facts), encourages Ford to study how (neo-liberal) governmentality works *through* jurisdiction. As we will see later in this section, such an understanding of jurisdiction has recently been further advanced by a number of other scholars in the Foucauldian tradition. As Ford puts it, “jurisdiction is a tool for government”.⁸⁸⁵ And, in particular territorial jurisdiction works as a “foundational technology of political liberalism”.⁸⁸⁶ As tool and technology of (neo-)liberalism jurisdiction is, firstly, part and parcel of a wider spectrum of so-called ‘technologies of the self’ as it is, secondly, an important boundary drawing device. As Ford describes it:

“Just as liberal institutions such as individual rights help to define the boundaries of the liberal citizen, so the institutions of jurisdiction define the body politic. These *walls of liberalism* do in fact define liberty, but they do much more than this – *they create the very entity that is to enjoy liberty*. Both individual rights and the formal rule of jurisdiction are ‘technologies of the self’; they are discourses and concrete acts that define political selfhood and provide the model for biological individuals to ‘perform themselves’ as (autonomous, rational, profit-maximizing, god fearing, desiring, raced, sexed) selves”.⁸⁸⁷

Closely connected to the observation that jurisdiction helps to create the ‘walls of liberalism’ is the claim that it is in particular territorial jurisdiction which “construct[s] *political subjectivity*”.⁸⁸⁸ This is the case because modern governments “are defined by territory” and individuals move within territories. As such, jurisdiction “in fact defines a relationship between the government and

⁸⁸⁴ Ford, 858 (emphasis in the original).

⁸⁸⁵ Ford, 898.

⁸⁸⁶ Ford, 897.

⁸⁸⁷ Ford, 898 (emphasis added).

⁸⁸⁸ Ford, 899 (emphasis in the original).

individuals, mediated by space. Territory acts as a medium of governmental power as well as its primary object. Territory is, in this sense, a container that holds a bundle of individuals and resources, just as fee simple ownership of real property consists of a bundle of rights”.⁸⁸⁹ I will come back in the next section to the tight link between jurisdiction and territoriality when I reconstruct the history of jurisdiction. But, for now, one last point in Ford’s approach to jurisdiction is worthwhile to address with regard to our discussion.

When I introduced in Chapter 3 the projects of the two critical international legal scholars David Kennedy and Martti Koskenniemi, I emphasised that both share the method to reconstruct legal argumentation through ‘doubles’ or ‘binaries’ – in the case of Kennedy these doubles were more or less contingent in substance while Koskenniemi linked all the variegating doubles of international legal argumentation to the original binary – the root binary – of normativity and concreteness. In a similar fashion, Ford attempts to deconstruct the discourse of jurisdiction by making use of the method of doubling.⁸⁹⁰ According to Ford, the *structure of the jurisdictional argument* oscillates between two opposed conceptions – and projects – of jurisdiction, as arguments about jurisdiction can either be linked to a “synthetic” or an “organic” conception of jurisdiction. This opposition can be employed “by various actors as arguments for or against a given controversial action”.⁸⁹¹ It is indicative to see that Ford illustrates this argumentative struggle between different notions of jurisdiction with the following example:

“For instance, a jurisdiction may be described as synthetic by someone who wishes to change the jurisdiction against the wishes of affected parties, while the same jurisdiction may be described as ‘organic’ by those who wish to assert ‘rights’ to the jurisdiction”.⁸⁹²

⁸⁸⁹ Ford, 904; the container metaphor goes back to Peter J. Taylor, ‘The State as Container: Territoriality in the Modern World-System’, *Progress in Human Geography* 18, no. 2 (1994): 151–62.

⁸⁹⁰ And, as in the case of David Kennedy, the methodological inspiration comes from Duncan Kennedy’s masterful deconstruction of Blackstone’s Commentaries: Duncan Kennedy, ‘The Structure of Blackstone’s Commentaries’, *Buffalo Law Review* 28 (1979): 205–382.

⁸⁹¹ Ford, ‘Law’s Territory’, 861–862.

⁸⁹² Ford, 862.

According to Ford, conceptualising jurisdiction in an “organic” way means that it “corresponds with *the production of the local*” as it “safeguards tradition and legacy”. Here, jurisdiction emerges from a natural order and is as such conceptualized as pre-political. “Synthetic jurisdiction”, on the other hand, “corresponds with the *regularization of the body politic*” and “stands for progress and efficiency”.⁸⁹³ Treating jurisdiction as synthetic implies also that jurisdiction is socially imposed and, hence, the result of a foundational political process. Furthermore, organic jurisdiction naturalizes while its synthetic counterpart rationalizes. The two poles of jurisdiction resemble also the German distinction between *Gemeinschaft* (community) and *Gesellschaft* (society). Although both notions of jurisdiction seem to build a stable opposition, they are never hermetically closed – and, from a critical perspective, to find cases in between will destabilize and deconstruct the opposition.

For instance, when we go back to our introductory example – the dispute between the AU and the ICC – we can see how this dispute oscillates between both notions of jurisdiction. On a first glance, it seems that the AU invokes an organic conception of jurisdiction as it claims that the prosecution should be referred back to the judiciary of Kenya as the local Kenyan jurisdiction is the natural side to decide the case – also in order to maintain stability and avoid violence; while on the other side the ICC seems more to correspond to a synthetic conception of jurisdiction as it points to its capacity to rationalize through process, progress and efficiency. However, on further scrutiny we can also see that the binary is not hermetically closed as the ICC often operates through the seemingly pre-political (natural justice-like) principle of impunity while the AU points to its capacity to rationalize the conflict as Kenya has, in the meantime, ‘improved’ (i.e., rationalized in a Western sense) its domestic judiciary system.

At this point, it is useful to look at how we can refine, improve and expand Ford’s account of jurisdiction. With regard to our purpose three recent developments seem to be of particular interest. First, there is an emerging scholarship, which links the concept of jurisdiction to a ‘thicker’ notion of politics.

⁸⁹³ Ford, 862.

Introducing this research will help me to clarify what I actually mean when I speak of the *politics* of jurisdiction. Second, deepening the understanding of jurisdiction from a Foucauldian perspective (broadly conceived) will help me to point not only to the ‘territorial’ but also to broader *spatial* and *temporal* dimensions of jurisdiction. And finally, reconstructing the literature on jurisdiction and legal pluralism will provide me with important links to the debate on the fragmentation of international law, which I addressed below in Chapter 4.

2.2 Jurisdiction and Politics: Kaushal

What does it actually mean, when we speak about the *politics* of jurisdiction? Asha Kaushal, for instance, argued recently that we should understand *jurisdiction as a genuine political concept*.⁸⁹⁴ “Jurisdiction is not insulated by technical padding, it is necessarily political too – from the beginning and all the way along”.⁸⁹⁵ Drawing mainly on discussions in political and legal theory, Kaushal attempts to move ‘beyond’ Ford’s account.⁸⁹⁶ A good starting point in this regard is her discussion of Ford’s binary of synthetic and organic forms of jurisdiction. As Kaushal highlights:

“Territorial jurisdictions not only produce synthetic identities of rationalisation and draw lines around already-existing organic identities, thus fomenting two corollary kinds of political subjectivity, they also do something more basic: they enact the very idea of political identity and subjectivity”.⁸⁹⁷

In this context it is important to note that for Kaushal the political is about *constituting a collectivity as community* and *how a community is linked to power and authority*.⁸⁹⁸ It seems that in this account every community is necessarily based on a legal order – *ubi societas ibi ius*. And where there is law, there is jurisdiction.

⁸⁹⁴ Kaushal, ‘The Politics of Jurisdiction’.

⁸⁹⁵ Kaushal, 764.

⁸⁹⁶ For a similar but also different attempt to link political and legal theory, see Dorsett and McVeigh, *Jurisdiction*.

⁸⁹⁷ Kaushal, ‘The Politics of Jurisdiction’, 769.

⁸⁹⁸ Kaushal, 764; Kaushal draws mainly on Sheldon Wolin, who conceptualises the political as ‘the union of authority and community’, Sheldon Wolin, *Politics and Vision*, 2nd ed. (Princeton: Princeton University Press, 2004), 314.

Jurisdiction has then the function to highlight the boundaries of law, as it inhabits the “threshold between law and non-law”.⁸⁹⁹ According to Kaushal jurisdiction is here the „labourer of law“ as it sets “the original terms of the existence of law, and then for its entry and exit”.⁹⁰⁰ Jurisdiction is hence about the “modes or manner of coming into law [and] of belonging to law”.⁹⁰¹ In other words, first come questions of jurisdiction and then only those of more ‘material’ law.⁹⁰² Consequently, in terms of research, the study of jurisdiction provides us with “a valuable lens because it illuminates the *legal threshold* – the limits and bounds of law. This means that jurisdictional inquiries tell us what law is willing to let in and what it keeps out”.⁹⁰³ *To study the politics of jurisdiction works thus as a proxy to study – let’s say – the politics of international law – and due to the growing relevance of legal language in global politics more generally, to study jurisdiction pins down the processes of how global authority is contested and allocated.*⁹⁰⁴

To study jurisdiction in this way, points also to the fact that the politics of jurisdiction is not only linked to *territorial* jurisdiction, as it was still the case in Ford’s early critical (frame)work. For sure, Ford himself emphasised that he examines territorial jurisdiction only because it is the prevailing form in law and that, in the end, “jurisdictional space is conceptually empty” and as such an “empty vessel for governmental power”, which in turn can be filled with “any number of specific things and social relationships”.⁹⁰⁵ But even the ‘empty vessel’ in Ford’s account is still connected to spatial scales, metaphors and devices (such as maps and cartography).

⁸⁹⁹ Kaushal, ‘The Politics of Jurisdiction’, 783.

⁹⁰⁰ Kaushal, 759.

⁹⁰¹ Kaushal, 759.

⁹⁰² Noll, ‘Theorizing Jurisdiction’, 601.

⁹⁰³ Kaushal, ‘The Politics of Jurisdiction’, 791 (emphasis in the original).

⁹⁰⁴ This links certainly to the recent discussions on different forms of non-legality and a-legality. On this see Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013); and Hans Lindahl, ‘A-Legality: Postnationalism and the Question of Legal Boundaries’, *The Modern Law Review* 73, no. 1 (2010): 30–56. I addressed this also in Chapter 1.

⁹⁰⁵ Ford, ‘Law’s Territory’, 504.

2.3 Jurisdiction as *Chronotope* (Valverde)

It was particularly Mariana Valverde who started to claim that critical scholars should overcome the strong tie between jurisdiction and territoriality, which has been foundational of modernity's conceptions of the 'state' and the 'international'.⁹⁰⁶ By leaving the tie between jurisdiction and territoriality behind, Valverde attempts to understand *how governance through jurisdiction works*. She shares this Foucauldian-inspired interest with Ford (although Ford, as we have seen, still discusses it in the context of territorial jurisdiction). As Valverde puts it, to investigate jurisdiction will help us to better understand how law and governmentality are interlinked as "[l]egal governance [...] is always already governed: and the *governance of legal governance is the work of jurisdiction*".⁹⁰⁷

In order to understand the 'governance of legal governance' properly, it is important to move beyond an exclusively spatial concept of jurisdiction as such a concept only reveals the "where" (i.e., in which territory) and the "who" (i.e., whose authority) of governance.⁹⁰⁸ These were the main concerns of, e.g., Kaushal's discussion of jurisdiction and political community. Valverde, however, postulates that the critical analysis of jurisdiction should go one step further and concentrate as well on the "how" of governance, i.e. how governance through jurisdiction works.⁹⁰⁹

This implies methodologically that one should focus on how different *projects of jurisdiction* are connected to different *logics and practices of governance*.⁹¹⁰ Here, Valverde stresses the necessity of foregrounding the role, which legal technicalities play in these projects of jurisdiction.⁹¹¹ Moreover, to scrutinize projects of

⁹⁰⁶ Cf. Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Governance* (Abingdon: Routledge, 2015), 37–45, 57. Valverde repeatedly engaged with jurisdiction, see Mariana Valverde, 'Analyzing the Governance of Security: Jurisdiction and Scale', *Behemoth* 1, no. 1 (2008): 3–15; Mariana Valverde, 'Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory', *Social & Legal Studies* 18, no. 2 (2009): 139–57; and Mariana Valverde, 'Studying the Governance of Crime and Security: Space, Time and Jurisdiction', *Criminology and Criminal Justice* 14, no. 4 (2014): 379–91.

⁹⁰⁷ Valverde, 'Jurisdiction and Scale', 141 (emphasis added).

⁹⁰⁸ Valverde, 144.

⁹⁰⁹ Valverde, 144; Valverde, 'Studying the Governance of Crime and Security', 388.

⁹¹⁰ Valverde, 'Studying the Governance of Crime and Security', 383–385.

⁹¹¹ Cf. Valverde, 'Jurisdiction and Scale'.

jurisdiction vis-à-vis different logics and practices of governance reveals that different jurisdictional projects do not just incorporate different ways to divide (territorial) space but also different ways of temporal (and other forms of) ordering as “each mode of jurisdiction has one or more distinct temporalities”.⁹¹² For instance, a jurisdictional project based on criminal law (usually conceptualised through a ‘backward-looking’ logic) works differently than a project, which is tied to a logic of risk management (usually conceptualised as ‘forward-looking’). I will come back to this point in Chapter 7, where I reconstruct the recent use of international criminal law in the context of the discourse on intervention. For now it is, however, important to notice, that Valverde challenges also, as she calls it, the Newtonian idea of thinking space and time separately and objectively. Borrowing from Russian literary critic and semiotician Mikhail Bakhtin, Valverde introduces the notion of the “chronotope” and argues that we should think of different jurisdictional projects as *chronotopes*, i.e. intersections of time and space.⁹¹³ These projects operate on different levels of scale (regarding both space and time). To look at jurisdiction in this way enables us to understand complex governing manoeuvres in the broader “legal game of jurisdiction”:⁹¹⁴ different jurisdictional projects interact, intersect, overlap, clash and hybridize.

2.4 Jurisdiction and (Postmodern) Legal Pluralism: Berman and de Sousa Santos

To treat jurisdiction as a ‘game’ brings us also back to the debate(s) concerning the fragmentation and constitutionalization of international law, which I introduced in the preceding chapter. I mentioned in this context that critical scholars perceived – at least in the early 2000s – the supposedly on-going fragmentation of international law as a more or less favourable development. This positive evaluation of fragmentation was fostered by the idea that one can read fragmentation also as a pluralisation of the international legal order, which could then be connected to a broader normative project of ‘global legal and political pluralism’ (representing then the critical counter-project to global

⁹¹² Valverde, 154.

⁹¹³ See, in particular, Valverde, *Chronotopes of Law*, chap. 1.

⁹¹⁴ Valverde, ‘Jurisdiction and Scale’, 139. For a similar use of the game metaphor see Adler-Nissen and Gammeltoft-Hansen, *Sovereignty Games*.

constitutionalism). It is, therefore, of little surprise that critical studies of jurisdiction also started to incorporate insights from the literature on global legal pluralism. The most important contribution in this context is probably Paul Schiff Berman's seminal journal article on *The Globalization of Jurisdiction*, in which Berman elaborates on the basis of the conflict-of-laws-literature a cosmopolitan framework of global pluralism.⁹¹⁵ This framework is cosmopolitan (or liberal), as Berman claims, a "jurisdictional community", which is based on liberal values broadly conceived, should emerge and serve as a space for jurisdictional debates in order to solve conflicts of laws and the current clash of jurisdiction.⁹¹⁶ Such an image of jurisdictional community, however, replicates and projects the idea of the liberal modern nation state only on a global scale – it creates a functional equivalent.

Yet, there is a more radical strand in the literature on global legal pluralism, which goes one step further as it does not search for functional equivalents of the nation state on a global level. For instance, Valverde repeatedly refers in her work to another pioneering piece of legal pluralism, which is Boaventura de Sousa Santos' influential 1987-article on a 'postmodern conception of law'.⁹¹⁷ In contrast to Berman, de Sousa Santos advances a more radical notion of legal pluralism, 'a pluralism without a centre' so to say, which he describes as follows:

"Legal pluralism is the key concept in a postmodern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life.

⁹¹⁵ Paul Schiff Berman, 'The Globalization of Jurisdiction', *University of Pennsylvania Law Review* 151, no. 2 (2002): 311–529; see also the discussion in Kaushal, 'The Politics of Jurisdiction', 771–775.

⁹¹⁶ See also the discussion in Alexis Galan and Dennis Patterson, 'The Limits of Normative Legal Pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*', *International Journal of Constitutional Law* 11, no. 3 (2013): 783–800.

⁹¹⁷ Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', *Journal of Law and Society* 14, no. 3 (1987): 279–302; Valverde, 'Jurisdiction and Scale', 140–143; Valverde, *Chronotopes of Law*, 48–51.

We live in a time of porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism and that is why it is the second key concept of a postmodern conception of law”.⁹¹⁸

From this point of view, to focus on ‘interlegality’ (a neologism advanced by de Sousa Santos, which obviously derives from the semiotic core concept of intertextuality) helps us to understand processes of fragmentation as highly dynamic “because the different legal spaces are non-synchronic and thus result on uneven and unstable mixings of legal codes (codes in a semiotic sense)”.⁹¹⁹ On the one hand, jurisdiction can help to settle disputes about “who rules over a spatiotemporal unit” as it is a boundary-drawing device. This is the case as “jurisdiction also sorts competing powers and knowledges into ready-made, clearly separate pigeon-holes. An open-ended non-legalistic discussion [...] is thus foreclosed”.⁹²⁰ On the other hand, jurisdictional boundaries are never fixed and stable: even when boundaries are formally established, disputes about jurisdiction will not end as this is only the starting point for conflicts about the ‘correct’ interpretation and management of these boundaries.

In short, this section challenged accounts, which only conceptualise jurisdiction as a technical aspect of law. By drawing on the emerging critical literature on jurisdiction, I rather suggested that jurisdiction should be conceived as a social and political practice. This helped me to highlight how governance through jurisdiction works and to introduce the cornerstone of a *multidimensional account of jurisdiction*, which enables us to analyse how different jurisdictional projects – involving different temporal and spatial logics – interact, intersect, overlap, clash and hybridize.

⁹¹⁸ de Sousa Santos, ‘A Map of Misreading’, 297–298 (emphasis in the original); . Another classic of the more radical strand of legal pluralism - this time from a modern systems theory perspective - would be Gunther Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society”, in *Global Law Without A State*, ed. Gunther Teubner (Aldershot: Dartmouth, 1997), 3–28.

⁹¹⁹ de Sousa Santos, ‘A Map of Misreading’, 298.

⁹²⁰ Valverde, *Chronotopes of Law*, 85.

3. A Short History of Jurisdiction

The previous section introduced recent literatures and debates, which started to engage with the concept of jurisdiction from a critical vantage point. As suggested at the outset of this chapter, I will now turn to the history of jurisdiction. This goes hand in hand with the suggestion of treating jurisdiction as a social and political practice. To treat jurisdiction as a social and political practice means that practices of jurisdiction change and transform over time and that we cannot operate with a concept of jurisdiction that operationalizes jurisdiction as an “ahistorical fixture of political organization”.⁹²¹

The aim of this section is thus to foreground the historical contingency of the meaning of the concept of jurisdiction, i.e. to highlight semantic shifts, and to reconstruct how the (still) prevailing notion of jurisdiction, i.e. as exclusive and territorial, emerged and became foundational of modern statecraft and the modern system of states. This will help, in turn, to better understand contemporary attempts and dynamics, which seem to undermine the traditional notion of exclusive territorial jurisdiction. I will scrutinize such attempts and dynamics in the following chapters. Thus, my analysis of the history of jurisdiction is not intended to provide a complete historical chronology of jurisdiction but, rather, I will limit myself – as I did in Chapter 2 with regard to different interdisciplinary projects between IR and IL – on key developments, episodes and focal points.⁹²² As such, my analysis deals with the emergence and transformation of the modern state system – treating both as complex, historically contingent, intertwined and entangled developments.⁹²³ My discussion will mainly focus on forms of rule, available legal vocabularies and representations of space (e.g. through maps). In addition, I will limit myself to three episodes, which are (3.1) the different forms of medieval jurisdiction, (3.2) the transition from the Middle Ages to Early Modern

⁹²¹ Ford, ‘Law’s Territory’, 866.

⁹²² Moreover, it is important to note that my historical account is basically restricted to developments of the Western, particularly European, state system and its global repercussions. This is due to the fact that I am concerned with how this particular form of jurisdiction became so powerful.

⁹²³ Or, as Saskia Sassen puts it, we can speak of variegating ‘assemblages’ - with the modern sovereign state assembling authorities, territories and rights differently as it was the case with the political entities of the Middle Ages, see Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

Europe and (3.3) the consolidation of exclusive territorial jurisdiction in what we conceive as the modern state system.⁹²⁴

3.1 Universal Jurisdiction(s), the Pope and the Holy Roman Empire

In order to understand the rise, formation and success of the notion of exclusive territorial jurisdiction it is important to reconstruct the way jurisdiction was conceptualised before the emergence of the modern nation state (read: modern, nation, state), in particular how it was conceptualised during the Middle Ages. Medieval forms of jurisdiction differ in many aspects from what is perceived as 'modern' forms of jurisdiction, as jurisdiction was during the Middle Ages neither conceptualised as territorial nor as exclusive.⁹²⁵

3.1.1 Overlapping jurisdictions and the Cosmology of the Middle Ages

During the Middle Ages, jurisdiction was not exclusive but rather – at least from the moderns' point of view – *overlapping*. As has been widely noted, the medieval period was shaped by the “existence of multiple crisscrossing”⁹²⁶, “crosscutting”⁹²⁷ or “interwoven and overlapping”⁹²⁸ jurisdictions. The political system of the Middle Ages was composed of complex and diverse ‘assemblages’ of various polities and communities: there were kingdoms such as Portugal, England and France, vassals, feudal lordships, duchies, principalities, city-states in Italy or free cities such as Cologne, city-leagues such as the Hanseatic League, guilds, merchants, the papacy, local bishoprics, the Holy Roman Empire and so on. All of these different forms of political organisation claimed their own jurisdictions –

⁹²⁴ A last note: As I advance rather in broad brushes, it is sufficient for the sake of my argument to refer mainly to secondary sources.

⁹²⁵ See, for example, Jordan Branch, *The Cartographic State: Maps, Territory and the Origins of Sovereignty* (Cambridge: Cambridge University Press, 2014), 23–29; Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton: Princeton University Press, 1994), chap. 3; and John Gerard Ruggie, ‘Territoriality and beyond: Problematising Modernity in International Relations’, *International Organization* 47, no. 1 (1993): 149–150.

⁹²⁶ Sassen, *Territory, Authority, Rights*, 32.

⁹²⁷ Spruyt, *The Sovereign State and Its Competitors*, 36.

⁹²⁸ John Gerard Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998), 23–24.

often having “shaky jurisdiction” only.⁹²⁹ Things were even more complicated as both the Holy Roman Empire and the papacy claimed universal jurisdiction. Universal jurisdiction referred in this context however to different spheres of jurisdiction. While the Pope claimed *universal spiritual jurisdiction*, i.e. jurisdiction in questions of faith, the Emperor held *universal temporal jurisdiction* over his realm in order to guarantee the implementation of the Christian community. For example, Hendrik Spruyt describes the relationship of Pope and Emperor as follows:

“The church, with its clear perception of hierarchy, saw itself as a community of believers with no geographic limits to its authority. Inclusion in the membership of the church meant being part of a religious community. There were believers and infidels. Logically, there were no territorial limits to the inclusion of such faithful. But as the name indicates, the Holy Roman Empire claimed that very same constituency and legitimated its power by a semireligious status of its own. The emperor claimed superiority over all other rulers. Frederick II thus claimed to rule as *dominus mundi*, ‘lord of the world’”.⁹³⁰

Importantly, these claims for universal jurisdiction were often based rather on rights (*de jure* jurisdiction) than on control (*de facto* jurisdiction).⁹³¹

Yet not only the forms of rule were diverse as one can find a similar picture if we turn to the legal landscape of that period. With regard to medieval law we can find a number of different, coexisting and overlapping bodies of law and (their related) institutions. Law, at this time (as we can see, e.g., in the work of Isidore of Seville), was considered as being part of ethics since it is concerned with human behaviour.⁹³² Taken the diversity of law into consideration, for instance, the literature on legal pluralism sums up that we can find different versions of (usually

⁹²⁹ Friedrich Kratochwil, ‘Of Maps, Law, and Politics: An Inquiry into the Changing Meaning of Territoriality’, *DIIS Working Paper* 2011, no. 3 (2011): 10.

⁹³⁰ Spruyt, *The Sovereign State and Its Competitors*, 35; see also Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500-c.1800* (New Haven: Yale University Press, 1995), chap. 2.

⁹³¹ Orford, ‘Jurisdiction without Territory’, 988.

⁹³² Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 46.

unwritten) folk, tribal and (in particular Germanic) customary law; urban laws; the canon (or ecclesial) law of the church; the *lex mercatoria* of the merchants; and vernacular Roman law. Some of these forms of law were local, others such as canon law or the *lex mercatoria* applied to most parts of Europe.

In addition, there existed different forms of courts applying these different forms of law. For instance, there were manorial courts, municipal courts, merchant courts, guild courts, church courts or royal courts – having different kinds of judges ranging from barons to kings, from guild members to burghers, from bishops to the pope, etc.. And finally, different versions of law were applied to different groups within the population, i.e. it made a difference whether one was Frankish, Burgundian or Alemannic; or whether one was a Jew or, on the Iberian Peninsula before the so-called *Reconquista*, a Muslim.⁹³³

At least for the Christian population, however, these diverse forms and institutions of rule and law were not necessarily perceived as fragmented but rather as being part of a bigger order: the Christian commonwealth. As, for example, Jens Bartelson remarks,

“high medieval Christian society was a universal society; it was universal insofar as the Church – the *Ecclesia* – understood itself as an indivisible unity covering every aspect of man’s political and social being, and the preservation of this essential wholeness was the prime purpose of earthly authority. This society was also universal in the sense that it remained insensitive to all ethnical, regional and linguistic difference; all social forms were subsumed under the Christian norm. Its structural unity and the universality of its content were both ontologically associated with the idea of an immutable hierarchical order connecting micro- and macrocosm together in a preordained and

⁹³³ Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, *Sydney Law Review* 30, no. 3 (2008): 377–379; see also Sassen, *Territory, Authority, Rights*, 61–67; and Walter Ullmann, ed., *Law and Jurisdiction in the Middle Ages* (London: Variorum Reprints, 1988).

harmonious relationship. [...]. This societal whole was conceived as an earthly expression of a heavenly pattern”.⁹³⁴

Thus, the idea that mankind is living in a universal order is not restricted to social activities alone as it covers the whole spectrum of human experiences with regard to society and nature.⁹³⁵ As Bartelson further explains in rather bright strokes,

“Medieval cosmology was based on a variety of sources, most of which distinguished between a celestial and a terrestrial region. While the former embraced everything from the moon to the limits of the universe, the latter included everything below the moon to the centre of the earth. According to Genesis I, 9, terrestrial region was in turn divided into two different zones, those of the earth and water respectively. These zones were mutually exclusive, so where there was water, there could be no earth, and conversely. From a biblical perspective, the ocean literally marked the end of the known and inhabitable world. The Latin and Greek terms most frequently used to describe this world was *orbis terrarum* or *oikoumene*”.⁹³⁶

While the Latin *orbis terrarum* describes the known world rather in spatial terms, the Greek *oikoumene* refers more to humanity as a social whole. The term *oikoumene* (οικουμένη) derives, *inter alia*, from the word *koine* (κοινή), which represented for the Ancient Greeks the common linguistic community (and – resulting from this – common cultural community). As Anthony Pagden points out, the idea of the *koine* was expanded by Aristotle through the notion of *koinos nomos* (κοινος νομος), which refers to the universal legal order of all mankind.⁹³⁷ It is important to understand that medieval law was still heavily influenced by the idea

⁹³⁴ Bartelson, *A Genealogy of Sovereignty*, 91 (emphasis in the original).

⁹³⁵ For a reconstruction of the history and a statement of the historicity of the divide between society (understood as culture) and nature, see Bruno Latour, *We Have Never Been Modern* (Cambridge: Harvard University Press, 1993).

⁹³⁶ Jens Bartelson, ‘The Social Construction of Globality’, *International Political Sociology* 4, no. 3 (2010): 223–224 (reference omitted, emphasis in the original); Jens Bartelson, *Visions of World Community* (Cambridge: Cambridge University Press, 2009), 61–62; see also Nikolas M. Rajkovic, ‘On Fragments and Geometry: The International Legal Order as Metaphor and How It Matters’, *Erasmus Law Review* 6, no. 1 (2013): 11.

⁹³⁷ Pagden, *Lords of All the World*, 19–20.

of the *koinos nomos*.⁹³⁸ Nevertheless, these Ancient ideas had been *translated* into the life world of medieval cosmology. For instance, Jerusalem – as the Holy City – represented the centre of the *oikoumene* and the *orbis terrarum*. Furthermore, the borders of the *koinos nomos*, the *oikoumene* and the *orbis terrarum* should ‘ideally’ coincide and, if this was not the case, it was the task of the Church and the Emperor, e.g. through Crusades to ensure it.⁹³⁹

3.1.2 Jurisdiction and Space beyond Territory

This brings me to a second point. As noted already, the concept of *orbis terrarum* is rather a spatial notion. However, the space of the *orbis terrarum* differs considerable from modern imaginaries of space. This is the case, as during the Middle Ages space was often not perceived as genuinely territorial and, even if perceived as territorial, territoriality itself could mean something completely different.⁹⁴⁰ As a corollary of medieval non-territorial images of space, jurisdiction was often conceptualised as *non-territorial*. This explains also why during the medieval period overlapping jurisdictions were often not perceived as problematic. The best way to conceive medieval images of non-territorial space and jurisdiction is probably to reconstruct the way *cartography* worked and how *maps* were used during this period. To be sure, this does not mean that cartography alone can explain (transformations of) spatial imaginaries – as Valverde has warned us, to insist on this would produce some kind of “cartographic determinism”⁹⁴¹ – but, I argue, that studying cartography can nevertheless help us to better understand shifts in spatial orders (and *vice versa*). For example, as Jordan Branch notes, mapping “shapes the conditions of possibility of how actors conceive space, territory, and political authority”.⁹⁴² As such “maps,

⁹³⁸ Pagden, 29.

⁹³⁹ Bartelson, ‘The Social Construction of Globality’, 224.

⁹⁴⁰ As Ruggie notes, ‘[first] system of rules need not be territorial at all; [second] systems of rule need not be territorially fixed; [third] even where systems of rule are territorial, and even where territoriality is relatively fixed, the prevailing concept of territory need not entail mutual exclusion’, Ruggie, ‘Territoriality and Beyond’, 149.

⁹⁴¹ Valverde, *Chronotopes of Law*, 50.

⁹⁴² Branch, *The Cartographic State*, 41; see also Kratochwil, ‘Of Maps, Law, and Politics’, 14.

like theories, shape our understanding of the world by highlighting – and obscuring – particular spatial and social features”.⁹⁴³

In general, medieval mapping and the related spatial imaginaries differed considerably from their modern counterparts.⁹⁴⁴ During the Middle Ages different traditions of mapmaking existed. Probably the most common forms of maps were the so-called *mappae mundi*. Although, as the name *mappae mundi* already indicates, these maps depicted the entire world as it was known to Europeans, they were rather schematic and mainly for religious purpose. As religious maps, *mappae mundi* often hung in cathedrals and portrayed biblical anecdotes. They placed Jerusalem into their centre. In order to make this work, topographical details were only secondary and they depicted the three known continents of the *orbis terrarum* – Europe, Asia and Africa – as identical in size and form.⁹⁴⁵ A radical form of this way of mapping was the so-called *T/O map*, which was included in books. These maps were coined T/O maps because of their shape: They consisted of a circle, the ‘O’, representing the known world, which was divided through a line running from left to right and representing the rivers Don (Tanais) and Nile; the Mediterranean sea was located at the middle of this axis running from there to the bottom, thus completing the ‘T’ within the ‘O’. Again, Jerusalem was placed in the centre as Asia occupied the upper part of the map, Europe the bottom left and Africa the bottom right.⁹⁴⁶ As Stuart Elden suggests these religious maps “are simply representations of the *oikoumene*, not the earth as a whole”.⁹⁴⁷

A second group of maps consisted of itinerary maps, i.e. maps made for orientation and navigation – both on land and on sea. In contrast to *mappae mundi* and *T/O maps*, these maps were rather regional and local. The *strip map* was often used by pilgrims, which represented the prevailing group of medieval travellers. These maps depicted routes as a straight line, listing and lining up the various

⁹⁴³ Branch, *The Cartographic State*, 36.

⁹⁴⁴ As I will concentrate on the European context, see for a discussion and comparison of non-modern types of maps within and outside of Europe, see Walter Mignolo, *The Darker Side of Renaissance: Literacy, Territoriality, and Colonization* (Ann Arbor: The University of Michigan Press, 1995), chap. 5.

⁹⁴⁵ Branch, *The Cartographic State*, 43.

⁹⁴⁶ Cf. Stuart Elden, *The Birth of Territory* (Chicago: The University of Chicago Press, 2013), 114–115; and Padrón, *The Spacious World*, 34–35.

⁹⁴⁷ Elden, *The Birth of Territory*, 115.

places of an itinerary like pearls on a string. As a consequence, these maps ignored any directional orientation. In contrast, *Portolan charts*, which were used for ship boat navigation, depicted coastlines in geographically accurate terms. Nevertheless, they differ from modern mapping techniques as they focused on distances in travel time between different coastal points and lacked a grid system of longitude and latitude.⁹⁴⁸ As a third group *cadastral maps* were in use. Cadastral maps defined the extent of settled and cultivated land and served to collect taxes.⁹⁴⁹

Despite all differences, two things are common to all three groups of maps. Firstly, maps were scarcely used. One of the reasons was of course the lack of modern printing techniques and infrastructures. But, more importantly, the lack of maps was facilitated by the “privileging of textual description over visual depiction”:⁹⁵⁰ extent and structure of the *oikoumene* were rather represented by the written word of the bible, travelogues were preferred by the pilgrims⁹⁵¹ and rulers trusted more in cadastral surveys than in cadastral maps. Privileging the written form had also the consequence that one could consistently describe overlapping authorities whereas modern mapping techniques render it nearly impossible: in textual representation overlapping authority is thinkable, in two-dimensional maps it is not. Secondly, medieval cartographical techniques did not depict space with geographical accuracy. What was in general lacking here was the representation of space as territory. As Branch points out “the world was understood as a series of unique places rather than as geometric area or expanse; and [...] space was conceived in terms of time as much as distance”.⁹⁵² This was also due to the lack of boundaries in a modern sense, i.e. as discrete lines of demarcation.⁹⁵³ We can see this, inter alia, in medieval cartography, which was almost entirely lacking any representation of boundaries. If space was

⁹⁴⁸ See Branch, *The Cartographic State*, 43–46; and Ford, ‘Law’s Territory’, 874–875.

⁹⁴⁹ Ford, ‘Law’s Territory’, 874.

⁹⁵⁰ Branch, *The Cartographic State*, 46.

⁹⁵¹ Cf. Bartelson, *Visions of World Community*, 63.

⁹⁵² Branch, *The Cartographic State*, 48.

⁹⁵³ Cf. Friedrich Kratochwil, ‘Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System’, *World Politics* 39, no. 1 (1986): 27–52; Niklas Luhmann, ‘Territorial Borders as System Boundaries’, in *Cooperation and Conflict in Border Areas*, ed. Raimondo Strassoldo and Giovanni Delli Zotti (Milan: Franco Angeli, 1982), 238; Peter Sahlins, *Boundaries: The Making of France and Spain in the Pyrenees* (Berkeley: University of California Press, 1991).

conceptualised as territorial, territory was conceptualised as centre-focused, i.e. from a centre (or multiple centres) outward, rather than boundary-focused, i.e. from boundaries inwards. In other words, territoriality was constructed around 'places' instead of 'spaces'.⁹⁵⁴ As a consequence of the medieval notion of territoriality, territory was not conceived as sole basis of authority, rule and hence jurisdiction. Rather, authority, rule and jurisdiction were personal and attributed to the status of a ruler constituting a hierarchical connection between the ruler (may it be a king, the pope or the emperor) and 'his subjects'.

3.2 (Re)discoveries, *dominium* and the territorialisation of jurisdiction

The late medieval and early modern period witnessed a series of transformations with regard to space, rule and jurisdiction. These transformations were primarily facilitated by conflicts within and between the authorities of the Middle Ages, several rediscoveries of Ancient sources and the colonisation of the New World.

From the eleventh century onwards, the complex authoritative basis of the *oikumene* began gradually to erode as religion increasingly lost its institutional centrality. On the one hand, Pope and Emperor engaged more and more in disputes regarding the jurisdiction of each other, something that should eventually culminate in the Investiture Controversy (c. 1075-1122).⁹⁵⁵ According to Harold Berman, the Controversy was the root for the emergence of many Western legal institutions and concepts.⁹⁵⁶ Similarly Spruyt points out that it had "revolutionary impact" as it brought the medieval framework of two equally existing universal

⁹⁵⁴ See, e.g., Branch, *The Cartographic State*, 20–21; and Ford, 'Law's Territory', 866–880.

⁹⁵⁵ The Controversy was sparked by the question of investiture, i.e. whether the Emperor is allowed to install bishops and abbots. While this was common practice during most parts of the medieval period (constituting an important source of power for the Emperor), the Pope began questioning the procedure and claiming more autonomy from the Holy Roman Empire. The Controversy started in 1075 with the *Dictatus Papae* – a note of twenty-seven theses, where Pope Gregory VII claimed the supremacy of the papacy over the empire and denied the right of investiture to the emperor. The conflict escalated in the excommunication of Emperor Henry IV two years later and his deeply symbolic Walk to Canossa asking for the Pope's absolution, which he was granted. Yet, this was only the starting point of a decades long conflict between Pope and Emperor, which involved, e.g., the invasion of Rome by Henry IV, a number of antipopes and several changing coalitions. The whole conflicted ended only in 1122 in the compromise of the Concordat of Worms. For an overview, see, for example, Spruyt, *The Sovereign State and Its Competitors*, 48–51.

⁹⁵⁶ See, in particular, Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), chap. 2.

jurisdictions to an end.⁹⁵⁷ As a result, the Emperor started to develop the idea of universal secular rule opposed to the Pope's spiritual rule and, from now on, spiritual and secular rulers were rivals. In the end, however, the whole conflict led to an erosion of the authoritative position of both Pope and Emperor as it should strengthen the kings (and 'their' form of political organization, which should later become the territorial state).⁹⁵⁸ On the other hand, the church itself witnessed various internal rivalries and struggles, which should result most notably in the Great Schism between Orthodox and Catholic Church in the eleventh century, the Great Western Schism within the Catholic Church between the late thirteenth and fourteenth century (with temporarily three men claiming of being Pope) and the Age of Reformation (starting in the sixteenth century).

What is interesting for the current purpose is the fact that these various struggles also produced fundamental transformation in legal argumentation. It is important to notice here that the controversies of this period were carried on mainly in the language of law and even non-jurists had to make use of this language. As Antony Black points out, the "reason why non-jurists [...] adopted juristic language to such an extent was not that they found there a doctrine with which they agreed but that it was the obvious mode and vocabulary in which to discuss rights and so forth".⁹⁵⁹ As I noted above, the sources of high medieval law were diverse and diffuse, involving different forms of customary and vernacular law. This changed, however, during the late Middle Ages as the different opposing ecclesial and secular parties began to improve and/or create their legal arguments – in particular, the "investiture controversy [...] provided a stimulus to both sides to find legal arguments to support their case".⁹⁶⁰ For example, it was also during this period that the common law system began to develop in England.⁹⁶¹ Although the consolidation of the common law system took several centuries, the system was initially established during the regency of Henry II of England. The innovation of common law was the idea to impose royal jurisdiction upon civil and criminal

⁹⁵⁷ Spruyt, *The Sovereign State and Its Competitors*, 50.

⁹⁵⁸ Spruyt, 50.

⁹⁵⁹ Antony Black, *Political Thought in Europe, 1250-1450* (Cambridge: Cambridge University Press, 1992), 11.

⁹⁶⁰ Stein, *Roman Law in European History*, 43–44.

⁹⁶¹ The term common law should not be confused with the *jus commune*, which is a hybrid of Roman law and canon law.

matters – something which was previously under local and feudal jurisdiction and, respectively, under local and feudal law. The emergence of the common law tradition had two other important effects: On the one hand, it was one of the main factors in the centralization of the emerging English state and, on the other hand, it helped the English crown to gain independence from the jurisdiction of the Holy See as common law operates in a different way than canon law.⁹⁶²

Canon law, the law of the Church, worked differently as it benefited from the rediscovery and reinterpretation of classic Roman law. While Roman law was used in a vernacularized version during the whole Middle Ages, only the eleventh century saw a systematic revival of it. In 1077, a complete version of Justinian's *Digest* was found in Pisa.⁹⁶³ The *Digest* was commissioned by Roman emperor Justinian I in the sixth century and was composed by 50 books. Its aim was to represent a condensed, codified and systemized version of all Roman law. The rediscovery of the *Digest* led, in part, to the foundation of Europe's oldest university, the University of Bologna, in 1088, which should quickly become the legal capital (or "mother of laws") of Europe.⁹⁶⁴ Bologna was not the only university, which was established during this time (Oxford, Paris, Salamanca and Cambridge should quickly follow); and, as Harold Berman suggests, it was in particular the study of law which would become the "prototype of Western science" as the university system helped, *inter alia*, to give law – its scholarship, terminology and method – a "transnational" character and to produce the "professional class of lawyers".⁹⁶⁵

At the University of Bologna, the first generation of scholars working on the *Digest* were the so-called Glossators. They were known as Glossators as they provided the original text of the *Digest* with *glossae*: short notices between the lines or at the margins of the text, which should help to explain passages in the text and to embed the different legal rules into a general scheme of knowledge. In this

⁹⁶² Cf. Ford, 'Law's Territory', 880–888; see also the collection of essays in Anthony Musson, ed., *Boundaries of the Law: Geography, Gender, and Jurisdiction in Medieval and Early Modern Europe* (Aldershot: Ashgate, 2005). The rise of common law was *inter alia* facilitated by transformations in English literature. On this aspect, see Cormack, *A Power to Do Justice*.

⁹⁶³ Elden, *The Birth of Territory*, 215.

⁹⁶⁴ See Stein, *Roman Law in European History*, 52–54. Some even locate the beginning of the Renaissance at this point, Elden, *The Birth of Territory*, 216.

⁹⁶⁵ Berman, *Law and Revolution*, 151, 160–161.

context, law was not treated as part of ethics anymore but as part of logics, which consisted in turn of grammar, dialectic and rhetoric – all three building together the *trivium*.⁹⁶⁶ The Glossators were succeeded at the University of Bologna by the Commentators (or Post-Glossators). Although both schools had much in common, the Commentators took a more distanced position from the original text hence they were more interested in philosophical questions with regard to law. The most important difference was however, as Stuart Elden notes, the relationship between facts/world and law. While the Glossators blamed the facts for divergences from the legal text, the Commentators took the opposed position and tried to adapt the law to the facts.⁹⁶⁷

In more general terms, the rediscovery of the *Digest* changed the form of late-medieval legal argumentation as it, first, provided a role model for the systematization of legal theorizing and, second, popularized a number of classical Roman legal concepts, which were in the vernacularized versions of Roman law, although known, hardly used – these concepts included *iurisdictio*, *ius*, *officium*, *imperium*, *dominium*, *territorium* and *status* – the latter transforming during the fourteenth century into the concept of the state (and the various reflections in different European languages: *stato*, *estat*, *Staat* and *state*).⁹⁶⁸

Yet, this kind of rediscovery does not mean that late-medieval authors used these terms in the same way as they were used in sixth century Ancient Rome – it was not a project of mere transplantation. Rather, the Roman terms needed to be ‘translated’ into the various political debates of the late Middle Ages. This becomes also apparent by the fact that Roman law was used by both spiritual and feudal authorities as it helped the Church to develop the canonical law into the more coherent and sophisticated *Corpus Juris Canonici* – the body of ecclesial law, which was valid until the early-twentieth century – while it simultaneously provided the

⁹⁶⁶ Cf. Stein, *Roman Law in European History*, 46–52.

⁹⁶⁷ Elden, *The Birth of Territory*, 218.

⁹⁶⁸ Cf. Orford, ‘Jurisdiction without Territory’, 984. On the semantics of status/the state, see Quentin Skinner, ‘The State’, in *Political Innovation and Conceptual Change*, ed. Terrence Ball, James Farr, and Russel L. Hanson (Cambridge: Cambridge University Press, 1989), 91.

vantage point for the secular *Corpus Juris Civilis*, which should help secular authorities to make their claims against the Church.⁹⁶⁹

But, on the other hand, this does also not signify that the original meaning was completely lost during the various processes and forms of translation. A good example for our purpose is the use of the concept of *dominium* – and how *dominium*, *ius* and *jurisdiction* were related.⁹⁷⁰ Take, for instance, the following text passage:

“*Dominium* is something that inheres in the person of the owner [*domini*], but it applies to the thing owned. Similarly jurisdiction inheres in an office [*officio*] and in the person who holds the office, but it applies to a *territorium*, and [jurisdiction] is thus not a quality of the *territorium*, but rather of the person”.⁹⁷¹

These remarks are taken from the work of Bartolus of Saxoferrato (1314-1357). Bartolus is known today as one of the main protagonists of the school of the Commentators and, according to Quentin Skinner, “perhaps the most original jurist of the Middle Ages”.⁹⁷² Bartolus was less interested in the relationship between Church and Emperor as between Emperor and other secular rulers, such as the kings of France and England or the Italian city-states. Although these political units might be in conflict with the Emperor as they claim their own jurisdiction, the Emperor still has, as Bartolus argued, universal jurisdiction because “he alone had *dominium* over the world considered as a single whole”.⁹⁷³ This was perceived as unproblematic as the “Emperor had universal jurisdiction over the world as matter of right, not as a question of fact”.⁹⁷⁴ On the first view, this corresponds perfectly

⁹⁶⁹ Cf. Berman, *Law and Revolution*, chap. 5. The term *Corpus Juris Canonici* was used only from the fifteenth century onwards.

⁹⁷⁰ According to Richard Tuck, it was the debate on the relationship of *ius* and *dominium*, which framed late medieval and early modern political and legal thinking - and which provided us with the first elaborated theory of rights. See, in particular, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), chap. 1; see also Orford, ‘Jurisdiction without Territory’, 984.

⁹⁷¹ As cited in Elden, *The Birth of Territory*, 220 (emphasis and brackets by Elden).

⁹⁷² Quentin Skinner, *The Foundations of Modern Political Thought: The Renaissance*, vol. 1 (Cambridge: Cambridge University Press, 1978), 9.

⁹⁷³ As cited in Orford, ‘Jurisdiction without Territory’, 988.

⁹⁷⁴ Orford, 989.

with the classical medieval view of the *oikumene* and its corollary that overlapping jurisdictions might not cause a problem as they are not exclusive but nevertheless form a single whole.

However, what is interesting in Bartolus' remarks is the conceptual innovation that the question of jurisdiction was framed in analogy to the concept of *dominium*. In particular, it was Kratochwil, who repeatedly pointed out that the revival of the concept of *dominium* – and the subsequent shift in the semantic field of medieval rule and authority – was essential for the emergence of the notion of *exclusive* territoriality, the idea of state sovereignty and hence the formation of the modern system of states.⁹⁷⁵ Taken from classic Roman private law, the concept of *dominium* (usually translated as 'property' or 'ownership') concerns the 'rights' of a property holder over his/her property.⁹⁷⁶ In contrast to the different forms of medieval customary law – and here in particular Germanic customary law with its complex use rights (e.g., fishery, wood or pastoral rights) –, property was conceptualised as belonging exclusively to the property holder (*dominus*). The property holder had the right to control, use, take proceeds from and dispose his/her *dominium* as well as s/he was allowed to secure and/or recover the property from/after invasions.⁹⁷⁷

⁹⁷⁵ See particularly Kratochwil, 'Sovereignty as Dominium', 25–29; and Kratochwil, 'Of Maps, Law, and Politics', 9–15.

⁹⁷⁶ Ben Holland coined this – particularly 'that the modern concept of sovereignty owes its genesis to the rediscovery of Roman private property law' – the 'Roman law thesis', Ben Holland, 'Sovereignty as Dominium? Reconstructing the Constructivist Roman Law Thesis', *International Studies Quarterly* 54, no. 2 (2010): 450. According to Holland, the thesis is within IR first and foremost advanced by constructivist scholars – in addition to Kratochwil, in particular by Onuf and Ruggie (although one can certainly contest whether Ruggie fits into the constructivist camp or not). For Kratochwil see above. For Ruggie, see John Gerard Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis', *World Politics* 35, no. 2 (1983): 261–85; and Ruggie, 'Territoriality and Beyond'. For Onuf, see Onuf, 'Sovereignty'; and Nicholas Onuf and Peter Onuf, *Nations, Markets, and War: Modern History and the American Civil War* (Charlottesville: University Press of Virginia, 2006), 56–58. A recent example in IL is Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', *University of Toronto Law Journal* 61, no. 1 (2011): 1–36. The thesis seems to go back to P. E. Corbett, *Law and Society in the Relations of States* (New York: Harcourt, Brace and Company, 1951). Holland is in general sympathetic with the thesis and provides an in-depth empirical grounding of it. However, he is to some extent also critical. For instance, he argues that Kratochwil relies on a 'category mistake' when Kratochwil speaks about rights (*ius*) in the context of dominium, Holland, 'Sovereignty as Dominium?', 456. Likewise, Onuf and Onuf have noted that dominium was a 'power, not a right', Onuf and Onuf, *Nations, Markets, and War*, 75.

⁹⁷⁷ See Arash Abizadeh, 'Sovereign Jurisdiction, Territorial Rights, and Membership in Hobbes', in *The Oxford Handbook on Hobbes*, ed. Al P. Martinich and Kinch Hoekstra (Oxford: Oxford University Press, 2016), 401.

Furthermore, *dominium* essentially referred to 'land'.⁹⁷⁸ Consequently, land became, with reference to *dominium*, conceptualised as exclusive – involving a notion of exclusivity, which only makes a division of property on a horizontal axis possible as “Roman law said: ‘*usque ad inferos usque ad coelum*’, i.e., ‘everything down to hell and up to the heavens’ belonged exclusively to the owner and could only be conveyed in this fashion to somebody else.”⁹⁷⁹ Although, Bartolus still links, in accordance with medieval status-based conceptions of authority, *dominium* and jurisdiction to the person of the property holder or ruler, the rediscovery of *dominium* in legal and political theory provided nevertheless one starting point (among others) of a shift of authority from *status* to *locus*, which should culminate in the modern state (a concept, which ironically derives its meaning from *status*) along the notion of territorial and exclusive jurisdiction.

This broader shift from *status* to *locus* becomes visible in the changing denomination of kingdoms, too. While, for a long time, rulers were named after the population they ruled, the late-Middle Ages saw a shift towards the territories, which they ruled. In this context, the King of the Franks (*rex francorum*) became the King of France (*rex franciae*) or the King of the English (*rex anglorum*) the King of England (*rex angliae*).⁹⁸⁰

Yet, Justinian's *Digest* was not the only important rediscovery of Ancient sources that should strongly influence late medieval and early modern conceptions of jurisdiction. In a similar manner, the rediscovery of Claudius Ptolemy's *Geographia* played an equally fundamental role in the context of cartography and spatial imaginaries. The originally Greek text of the *Geographia* was written in the mid-second century and rediscovered – and translated into Latin – in northern Italy in the early-fifteenth century. The rediscovery of the *Geographia* marks the beginning of Renaissance cartography and it is the starting point of a “revolution in how maps were created, distributed, and used. This transformation of cartography,

⁹⁷⁸ Cf. Kratochwil, 'Sovereignty as Dominium', 25–26; Kratochwil, 'Of Maps, Law, and Politics', 10.

⁹⁷⁹ Kratochwil, 'Of Maps, Law, and Politics', 10 (emphasis in the original).

⁹⁸⁰ Walter Ullmann, 'Personality and Territoriality in the "Defensor Pacis": The Problem of Political Humanism', in *Law and Jurisdiction in the Middle Ages*, ed. Walter Ullmann (London: Variorum Reprints, 1988), 403. For accounts, which highlight the importance of French Kings (the Capetian Dynasty) for the formation of the modern state, see Sassen, *Territory, Authority, Rights*, chap. 2; and Spruyt, *The Sovereign State and Its Competitors*, chap. 5.

in turn, made possible and shaped equally drastic changes in how Europeans understood their world”.⁹⁸¹

The cartographic revolution occurred basically during the fifteenth and sixteenth century. Its key moment was a shift in the *projection method*. As noted above, medieval maps did not rely on geometric accuracy and were rather used in order to symbolise certain places – again: if maps were used at all, as textual description was privileged over visual representation.⁹⁸² In contrast, Ptolemaic cartography introduced the idea that “the world can and should be depicted visually with reference to a *coordinate-based grid system, thereby establishing geometric accuracy of scale, distance, and orientation as key cartographic goals*”.⁹⁸³ Simultaneously, to the invention of cartographic techniques based on a grid system (or planimetry or graticule), improvements in printing technologies helped to spread maps all over Europe.⁹⁸⁴ From the sixteenth century onwards not text but visual representation had become the prevailing method to depict space. And, it were not maps in general but the grid system of Ptolemy that should quickly become, as Ricardo Padrón puts it, “the universal idiom that could depict a single chart the sea and that could map the earth, that could depict a single city or the entire globe. With this development, a single type of map, the gridded map, becomes hegemonic in European culture: it establishes itself as the standard by which all other maps should be judged”.⁹⁸⁵

Moreover, modern cartography was at its beginning less in use within Europe but in the context of the first wave of the European expansion into the New World of the Americas – the epoch, which is today best known as Age of Discovery. In other words, the emergence of many techniques of modern statecraft –

⁹⁸¹ Branch, *The Cartographic State*, 50–51; see also Bartelson, ‘The Social Construction of Globality’, 228–229; and, for a more, cautious interpretation of the ‘revolution’, Padrón, *The Spacious World*, 65–71.

⁹⁸² Interestingly, even the rediscovery of Ptolemy’s *Geographia* was still influenced by this paradigm as its first translations focused rather on its text-related descriptions of the world and only later, during the early sixteenth century, the emphasis shifted to mapping techniques, cf. Branch, *The Cartographic State*, 51–52.

⁹⁸³ Branch, 52 (emphasis added).

⁹⁸⁴ This had also repercussion for the professional competition in the field of maps, as the cartographer increasingly replaced the mapmaker as expert on maps, Padrón, *The Spacious World*, 71.

⁹⁸⁵ Padrón, 71.

cartography being one of them – occurred (better, maybe: were tested) first *outside* of Europe. This stands of course against the conventional view that the European expansion was rather a one-way street with regard to ideas and practices as if these ideas and practices were simply imposed onto the New World. Rather, it was a process of translation, a back and forth, between the New and the Old World, which produced in the end a couple of central foundations of modern statecraft and the modern system of states. Put differently, these encounters were sites of knowledge production and – as we will see above – international law was arguably one product of these encounters.

The central problem for the two leading maritime political powers of the Age of Discovery, Spain (or, more accurately, Castile and León) and Portugal, was that the New World consisted of unknown territory, i.e. unknown space. In this context Columbus' 'discovery' of the Americas ('Indies') in 1492 only marked the most important of a number of controversies between Spain and Portugal on the possession of – and right to trade with – the newly discovered lands.⁹⁸⁶ These questions emerged first in the mid-fourteenth century when Castile and Portugal began to sail along the West African coast and stated to claim these territories. The claims were usually articulated in the vocabulary of *ius*, *iurisdictio* and *dominium*. In order to solve the disputes between both countries the Holy See intervened through a number of Papal Bulls.⁹⁸⁷ In 1452, the Bull *Dum diversas* granted the Portuguese "King Alfonso general and indefinite powers to search out and conquer all pagans, enslave them and appropriate their land and goods";⁹⁸⁸ in 1455, the Bull *Romanus Pontifex* reassured the resolution of *Dum diversas*; and, in 1493, only one year after Columbus' voyage and the 'discovery' of the Americas, Pope Alexander VI released the Bull *Inter caetera*, in which he 'donated' the lands of the Americas to the Castilian crown.⁹⁸⁹

⁹⁸⁶ Of course, this could also be framed in a Schmittian vocabulary as conflict over 'spheres of interest', Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 4th ed. (Berlin: Duncker & Humblot, 1997), chap. 2; see also Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte*, 2nd ed. (Baden-Baden: Nomos, 1988).

⁹⁸⁷ See Shaunnagh Dorsett, 'Mapping Territories', in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Abingdon: Routledge Cavendish, 2007), 144–145.

⁹⁸⁸ As cited in, Dorsett, 144.

⁹⁸⁹ Orford, 'Jurisdiction without Territory', 985–986; For a general discussion of these Papal Bulls, see Jörg Fisch, *Die europäische Expansion und das Völkerrecht: Die Auseinandersetzung um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Steiner, 1984),

Alexander did so, as he assigned all countries 100 leagues (which is approx. 300 miles) west of the Cape Verde Islands and the Azores, which were both already under Portuguese *dominium*, to Spain. In other words, Alexander intended to 'donate' the *dominium* over Africa to Portugal and over the Americas to Spain. Portugal and Spain finally started to settle their conflict in 1494, when both signed the Treaty of Tordesillas. The Treaty mostly confirmed the 'partition' of *Inter caetera*, although it moved the demarcation line westwards. The Treaty famously claimed that

"a boundary or straight line [*una rraya o linea derecha*] be determined and drawn, from pole to pole, on the said ocean [the Atlantic], from the Arctic to the Antarctic pole, north to south. This boundary or line shall be drawn straight, as aforesaid, at a distance of three hundred and seventy leagues west of Cape Verde Islands, being calculated by degrees, or by any other manner as may be considered the best and readiest, provided the distance shall be no greater than above said".⁹⁹⁰

Portugal and Spain concluded the 'partition' of the world 25 years later when they signed the Treaty of Saragossa (1529), which divided the eastern hemisphere (in particular, Asia) between both countries.

The history of the disputes between Portugal and Spain is important for my purpose for at least four reasons. First, the dispute mirrors the conflicts over jurisdiction of the late medieval and early modern ages, which I outlined above. Jurisdiction is still personalised as the Pope attributes in his Bulls *dominium* not to Portugal and Spain but in the case of *Dum diversas* and *Romanus Pontifex* to the Portuguese King Alfonso V while in *Inter caetera* to the Spanish King Ferdinand and Queen Isabella as well as their "heirs and successors, kings of Castile and

205–209. The monograph of Fisch, who was a student of Reinhardt Koselleck, presents a still valuable history of international law and the European expansion.

⁹⁹⁰ As cited in Elden, *The Birth of Territory*, 242 (brackets by Elden); see also Dorsett, 'Mapping Territories', 145; and Rajkovic, 'On Fragments and Geometry', 12.

Leon”.⁹⁹¹ In other words, the logic of *status* still dominates here over the logic of *locus*.

Second, it is important to note that it is the *Pope*, who *has the right to demarcate and to entitle* the Portuguese and Spanish Crowns to discover and possess the newly ‘discovered’ non-European and non-Christian territories. Thus, the Papal Bulls are not only, as it may seem *prime facie*, about Portugal and Spain but also claims (or reassurances) of the universal jurisdiction of the Pope himself vis-à-vis other European rulers. The relationship was so close that, as Pagden has called it, particularly Spain and the Catholic Church formed some kind of a “Church-State venture” in the New World, which should last at least until the nineteenth century.⁹⁹²

Third and closely related to this point, is the fact that later claims by the colonial competitors of the second wave of the European expansion, mainly England and the Netherlands, directly challenged the Papal Bulls and, hence, the Pope’s universal jurisdiction to distribute *dominium* to monarchs.⁹⁹³ Put differently, the Reformation was not only about religious conflicts within the European context but also about the struggle of European powers over non-European territories. For instance, English colonial theorists developed a distinct anti-Catholic position and argued that the English King or Queen could claim colonial territories, as s/he is also the Supreme Head of the Anglican Church.⁹⁹⁴ However, the dispute over the Pope’s universal jurisdiction over the New World was not only a dispute between the Catholic Church and the various strands of Protestantism, its new competitor in ecclesial questions, but also a dispute within the Catholic Church itself. The work of the Salamanca-based sixteenth century

⁹⁹¹ As cited in Orford, ‘Jurisdiction without Territory’, 985.

⁹⁹² Pagden, *Lords of All the World*, 33.

⁹⁹³ Orford, ‘Jurisdiction without Territory’, 986–988.

⁹⁹⁴ For an in-depth analysis, see David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), chap. 2. In the end, this turned into a conflict between two ‘solutions’ to ‘distribute’ the colonial territories. On the one hand, there was an attempt to establish a priori (before the colonial enterprise took place) monopolies between concurring European powers. This was the constellation of the Iberian expansion - with the Catholic Church as distributor of monopolies. On the other hand, there was the idea to use - ex posteriori - free competition (trade, shipping, acquisition of territory) to distribute the colonies. The second phase of the European expansion relied mainly on this system. See Fisch, *Die europäische Expansion und das Völkerrecht*, 49–50.

philosopher, theologian and jurist Francisco de Vitoria is exemplary, here.⁹⁹⁵ The Dominican Vitoria was puzzled by the question whether the people of the discovered lands (the ‘Indies’) had *dominium* over these lands. As Anthony Anghie has argued, this was for Vitoria a completely new situation (as it was not comparable with conflicts between, e.g., Christian and Muslim rulers) and as such Vitoria did not believe that it is possible to merely export and stipulate already existing European legal ideas to the issue at stake. Rather, Vitoria tried to translate these ideas to the new context as his “jurisprudence relies in many respects on existing doctrines, he *reconceptualises* these doctrines, or else *invents new ones*, in order to deal with the *novel problem* of the Indians”.⁹⁹⁶ According to Anghie, this situation was the foundational moment of international law: “international law was created out of the unique issue generated by the encounter between the Spanish and the Indians”.⁹⁹⁷ This is the case, as for Vitoria the Indians live outside the *oikumene* and, thus, neither Church nor Emperor have universal jurisdiction as the universal jurisdiction of both institutions is restricted to the Christian world. By the same token, also all law that is justified on a divine basis, as it is the case with the *koinon nomos*, cannot be valid. Anghie summarizes this position as follows: “The Spanish and the Indians are not bound by a universal, overarching system; instead, they belong to two different orders, and Vitoria interprets the gap between them in terms of the judicial problem of jurisdiction”.⁹⁹⁸ According to Vitoria, this is the case as the inhabitants of the New World are fully rational human beings and know a concept of *dominium* comparable to the one of the Old World.⁹⁹⁹ For Vitoria the solution is the invocation of universal secular natural law, a *jus gentium*, in order to be able to solve the legal disputes between the Spaniards and the Indians. Although, Vitoria’s approach may sound progressively as he uses

⁹⁹⁵ Another example would be the work of Bartolomeo de las Casas, which shared many similarities with Francisco de Vitoria’s line of argumentation, see Bartelson, *Visions of World Community*, 77–85. An overview over the ‘Salamanca school’ in general is, e.g., provided by Koskenniemi, ‘Empire and International Law’.

⁹⁹⁶ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 15 (emphasis added). For a discussion of the danger of anachronism in Anghie’s work, see Martti Koskenniemi, ‘Vitoria and Us: Thoughts on Critical Histories of International Law’, *Rechtsgeschichte-Legal History* 22 (2014): 119–38. See also to my earlier discussion in the introduction of the of Chapter 2 on the problems of a presentism in writing history.

⁹⁹⁷ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 15.

⁹⁹⁸ Anghie, 19.

⁹⁹⁹ Cf. Koskenniemi, ‘Empire and International Law’, 15.

“the language of liberality and even equality”, this is only half of the story.¹⁰⁰⁰ The other half is that Vitoria frames the *jus gentium* in such a way that the Indians are permanently in violation of ‘universal’ natural law, as they, e.g., deny the ‘right to travel’ – constituting a *jus* for Vitoria – to the Spanish *conquistadores*. This allows the Spaniards, in turn, to ‘sanction’ the Indians for their ‘violations’ of universal natural law. In other words, Vitoria’s invocation of a *jus gentium* has two consequences: on the one hand, it widens Spanish jurisdiction over the territories of the Indians as the Spanish can claim that they defend universal natural law; on the other hand, it serves also to limit Papal jurisdiction over these territories as they do not belong to the *oikumene*.

This brings me to my final – and a slightly different – point. The dispute between Portugal and Spain regarding the partition of non-Christian territories was a dispute about primarily unknown areas. This means that medieval itinerary mapping techniques, which used prominent geographical features as orientation points, did not work anymore.¹⁰⁰¹ We can see this in the Treaty of Tordesillas, which originally intended to divide the territories of both sides of the Atlantic Ocean to Portugal and Spain; respectively, with Portugal receiving *dominium* over Africa and Spain over the Americas. The line of the Treaty, however, was too far in the West and included land on the American continent: Portugal could claim *dominium* over what should become known as Brazil. In this context, modern maps increasingly became a valuable good as they provided hardly accessible knowledge. Already during the sixteenth-century maps were used by governments as, in the words of Branch, “‘weapons of imperialism,’ by claiming land ahead of actual conquest and legitimizing conquest during and after the fact”.¹⁰⁰² Moreover, they presented for European rulers important “symbols of power”.¹⁰⁰³

The various legal and cartographic revolutions as well as the discovery of the New World, also point to (and went hand in hand with) a deeper transformation in cosmological terms and the general imagination of space. As pointed out previously in this chapter, medieval cosmology consisted of the

¹⁰⁰⁰ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 28.

¹⁰⁰¹ See Kratochwil, ‘Of Maps, Law, and Politics’, 14.

¹⁰⁰² Branch, *The Cartographic State*, 105 (references omitted).

¹⁰⁰³ Padrón, *The Spacious World*, 8.

‘geographical’ formation of the *orbis terrarum* and the concept of the Christian community (the *oikumene*) – ideally both matching in scope and covering the known world as a whole. During the late-medieval and early-modern period both imaginaries collapsed. The idea of the *orbis terrarum* was finally refuted by what became known as the Copernican revolution and the idea of a *rotunditate absoluta*, which Nikolaus Copernicus introduced in his *De revolutionibus orbium coelestium* (1543). Bartelson summarizes this development as follows:

“First, rather than being united into one landmass, there are numerous different land formations distributed relatively evenly across the spherical surface of the globe. Second, rather than existing in separate spheres and having different centres of gravity, the elements of earth and water share the same centre of gravity. Third, the planet as a whole is best represented as a solid geological mass whose chasms are filled with water, the totality being one perfectly shaped sphere, a *rotunditate absoluta*. Copernicus thus managed to refute the view that the earth consisted of two spheres, located in a fixed position at the centre of the universe. According to the view set forth in *De revolutionibus*, the ocean is no longer a limit, but rather a trans-continental waterway, connecting different and discontinuous land formations to each other”.¹⁰⁰⁴

As Bartelson also notes, Copernicus refusal was ‘only’ the result of a longer transformation in European cosmology, as, e.g., Portuguese navigators were already earlier fully aware of the fact that the concept of an *orbis terrarum* is unsustainable;¹⁰⁰⁵ or, as a look (again!) at early-modern cartography reveals: Ptolemaic, i.e. grid-based and geometric, maps operated without a centre. As a consequence of the “geometricization” of space¹⁰⁰⁶ and the emergence of the notion of globality,¹⁰⁰⁷ Jerusalem and the Holy Land could not be placed in the

¹⁰⁰⁴ Bartelson, *Visions of World Community*, 71.

¹⁰⁰⁵ Bartelson, 72.

¹⁰⁰⁶ Branch, *The Cartographic State*, 113.

¹⁰⁰⁷ This is the reason why Bartelson suggests that globality is socially constructed as it reveals that “globality is neither a timeless condition nor a recent invention, but rather a social fact whose basic structure, genesis, dissemination, and subsequent functions can be opened to historical sociological inquiry”, Bartelson, ‘The Social Construction of Globality’, 231.

centre of maps any more (as it was the case in the tradition of the *mappae mundi*) – they just became places identical to all others.

These shifts in the imagination of space had also important repercussions on the concept of *oikumene*. This was also facilitated by the fact that the ‘discovery’ of the New World and its inhabitants confronted early-modern thinkers with an image of a radical fragmentation of mankind. As I noted above, Vitoria’s reaction consisted in a reconceptualization of the concept of universal community. He replaced the medieval *oikumene* through a new kind of universal community, which he based upon the rationality of all human beings and which was pulled together through the universal natural law of the *jus gentium*. As I also noted, the invocation of the *jus gentium* was far away from *effectively* granting rights to the Indians as it rather served the Spaniards to conquer the Indians’ territories. There was however another, a second, response on how community should be organized in the context of a fragmented *rotunditate absoluta*. It was a response, which started from the opposite direction as it took fragmentation for granted, unavoidable and inescapable. This response, and it should become the response that should deeply change first the political order on the European continent (and later also non-European territories), was the evolving notion of the *modern state*, i.e. the idea to territorialize and nationalize community.¹⁰⁰⁸ I will turn to this development now.

3.3 Territorial jurisdiction, the nation state and the *Lotus* Case

While the previous discussion focussed mainly the pre-history of the modern European state-system, I will now reconstruct its emergence, formation and consolidation.

3.3.1 Boundaries, jurisdiction and the production of territory

The partition of the *rotunditate absolute*, either into the empires of the European expansion or into nation states on the European continent, was further accelerated

¹⁰⁰⁸ Cf. Bartelson, *Visions of World Community*, 76–77.

by the *production of boundaries*. Whereas, as I pointed out earlier, medieval imaginaries of space conceptualised jurisdiction and authority through a recourse on place(s) and centre(s), we witness during the early modern period a shift – and it was a shift over a rather long period as it occurred gradually between the fifteenth century and the eighteenth century – towards conceptions of jurisdiction and authority, which rely mainly on images of bounded spaces and territories. Thus, boundaries began to play an increasingly important role. During the Middle Ages, boundaries were usually conceptualised as loose frontier zones, something which made overlapping (non-exclusive) forms of jurisdiction thinkable and possible.¹⁰⁰⁹ Here, jurisdiction was personalistic (i.e. a direct relationship between ruler and those who are ruled), connected to certain places (with the ruler in the centre) and control was conceptualised as radiating from a centre to the periphery – in other words, it was conceived as operating from the centre outwards.¹⁰¹⁰

However, the ‘geometricization’ of space, which took place during the early modern period and which saw a revival of grid-based systems of cartography, introduced the idea of clear and abstract boundaries. As noted above, already the Treaty of Tordesillas operated through a, as we can read in the original text, ‘boundary or straight line [*una rraya o linea derecha*]’ in order to divide unknown space. This way of organizing space, i.e. to draw first a line and then explore a certain territory should become a common practice in the European colonies – a practice, which is often considered to create fundamental problems until the present day as, e.g., African countries are often still perceived as ‘artificial’ constructions with internal conflicts between different ‘ethnic’ groups.¹⁰¹¹

¹⁰⁰⁹ Cf. Kratochwil, ‘Of Maps, Law, and Politics’, 10; and Kratochwil, ‘Of Systems, Boundaries, and Territoriality’, 33. For a critical discussion of the distinction of political geographers between boundary (‘precise, linear division, within a restrictive, political context’) and frontiers (‘connotes more zonal qualities, and a broader, social context’), see Sahlins, *Boundaries*, 4–6.

¹⁰¹⁰ Branch, *The Cartographic State*, 77.

¹⁰¹¹ Makau Mutua presents an in-depth discussion of the colonial legacy and, particularly, the effects of territorial partitions for the African continent. For him, the ‘artificial’ division of Africa by colonial powers, which was based either on ‘natural’ boundaries (e.g., rivers or mountains) or simply lines of longitude or latitude, is the origin of many conflicts in Africa. As this partition still exists after the end of formal colonialism, the African continent remains in the ‘straitjacket’ of colonialism (now exercised through the ‘postcolonial’ state). Mutua’s solution is to ‘redraw the map of Africa’ in order to give pre-colonial entities (and their modes of rule) the possibility of regaining self-determination. See Makau W. Mutua, ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’, *Michigan Journal of International Law* 16, no. 4 (1995): 1113–76. On the other hand, it is important to note that many of today’s ‘ethnic’ groups, which seem to be Mutua’s pre-colonial entities, are as well constructions of European colonialism.

In the European context, the “first official boundary in the modern sense”¹⁰¹² was determined in the Treaty of the Pyrenees (1659), which was negotiated and signed between France and Spain in order to allocate a border between these two countries in the Pyrenean mountains.¹⁰¹³ The idea of the Treaty was to establish a joint French and Spanish commission in order to ‘find’ the ‘natural border’ between both countries. However, the delimitation and demarcation took much longer as expected at the beginning and was concluded in 1868 only (in the Treaty of Bayonne) as the local population of the borderland started to offer resistance against the top-down approach to draw lines between villages and to force the inhabitants to either become French or Spanish.¹⁰¹⁴

In this context, four interrelated observations are important. First, concepts such as territory or natural borders have to be located in the social realm. As Kratochwil puts it:

“‘[T]erritoriality’ is, despite its seemingly referential link to a physical nature, a ‘social’ rather than a ‘natural kind’. It means that boundaries are *status ascriptions* rather than simply descriptive designations. This river of that mountain range *are* not a boundary, but *serve* as a boundary, the ideology of ‘natural boundaries’ á la Luis XIV notwithstanding”.¹⁰¹⁵

Second, abstract boundaries, as well as the treaties or maps on which they rely, contain a performative dimension. This is the case, as we can observe, that there was first an abstract line on a paper (may it be a demarcations between different European empires or the separation of Spain and France in the Pyrenees) and only then the line established social and political practices on the ground, which turned

¹⁰¹² Kratochwil, ‘Of Systems, Boundaries, and Territoriality’, 33.

¹⁰¹³ On the negotiation and evolution of this border, see the seminal study by Sahlins, *Boundaries*; see also Branch, *The Cartographic State*, 128–130.

¹⁰¹⁴ Cf. Sahlins, *Boundaries*, chap. 7.

¹⁰¹⁵ Kratochwil, ‘Of Maps, Law, and Politics’, 9 (emphasis in the original).

the line on a paper into a 'clear' and 'real' border on the ground.¹⁰¹⁶ Third, the aesthetics and political economy of boundaries and maps play an important role. Such mundane questions as printing techniques (lines are easier to draw as overlapping frontier zones) or commercial aspects (clear lines have a bigger market as they are considered as more aesthetic) play a significant role on how boundaries are represented on maps. This made certain actions thinkable and other not. Fourth, as Luhmann notes, modern boundaries do "not only separate, they also link" different political entities (or systems).¹⁰¹⁷ As such, boundaries "have a double function for systems of sufficient complexity. They serve as a differentiation of the system, stemming from its environment and as means of production of relations to other systems in this environment".¹⁰¹⁸ Boundaries and the subsequent idea of bounded territories with exclusive jurisdiction are constitutive for the modern system of state.

This means, that the emergence of bounded territories also gave rise to a 'homogenization' of space as it introduced the idea of undefined space within boundaries. Luhmann speaks in this context of the creation of an "'Innenraum' (internal space) for human behaviour".¹⁰¹⁹ Thus, rather than conceptualising space as radiating from the centre outwards, space was now thinkable as being homogenous within a bounded area. *As a consequence, the possibility of overlapping jurisdiction was replaced by the concept of exclusive jurisdiction.* This transformation of spatial imaginaries was, on the theoretical and conceptual side, finally concluded through a shift in the grammar of *geometry*, which occurred from the seventeenth century onwards. Here, in particular, the developments, which are attributed to René Descartes and Gottfried Wilhelm Leibniz, stand out. Both Descartes and Leibniz, simultaneously – it is still contested if independently –

¹⁰¹⁶ Or as Baudrillard famously put it, it is 'the map that preceded the territory', Jean Baudrillard, *Simulacra and Simulation* (Ann Arbor: University of Michigan Press, 1994), 1; see also Branch, *The Cartographic State*, 122.

¹⁰¹⁷ Luhmann, 'Territorial Borders as System Boundaries', 236. See also: 'A system exists as a difference in relation to its environment and it reflects this difference by means of boundaries', Luhmann, 236.

¹⁰¹⁸ Luhmann, 'Territorial Borders as System Boundaries', 237; see also Mathias Albert, 'On Boundaries, Territory and Postmodernity: An International Relations Perspective', *Geopolitics* 3, no. 1 (1998): 53–68; and Kratochwil, 'Of Systems, Boundaries, and Territoriality'. For a comprehensive discussion of this function of boundaries from a slightly different vantage point, see also R. B. J. Walker, *Out of Line: Essays on the Politics of Boundaries and the Limits of Modern Politics* (London: Routledge, 2016), chap. 1.

¹⁰¹⁹ Luhmann, 'Territorial Borders as System Boundaries', 237.

revolutionized the field of geometry, which had remained for a long time the Ancient Greek geometry of Euclid.¹⁰²⁰ Let me discuss briefly Descartes' contribution. Elden points out that Descartes' view of space as

“measurable, mappable, strictly demarcated, and thereby controllable, is precisely that which underpins the modern notion of political rather than solely geographical borders, the boundaries of states. Descartes' view of space is as radical a break from the geometry of Euclid (which, crucially, and despite the common assertion, includes no notion of space) as the modern state is from the Greek notion of *polis*”.¹⁰²¹

Descartes developed this view of space in two steps. First, Descartes distinguished mind (*res cogitans*) and body (*res extensa*).¹⁰²² Space is then located on the side of the *res extensa*, which encompasses the entire material world. The material world operates through extension (thus, the terms *res extensa*). Everything that is extended (Descartes speaks of 'bodies') is characterised by three dimensions, which in reality are inseparable: length, breadth and depth. These 'bodies', in turn,

“exist in space, a *spatium*, that is similarly extended. Two different things in size and shape can occupy the same *place*, but clearly not the same *space*. And when something moves, it is its place that has changed, not its size or shape. This is crucially important—space, not place, claims exclusivity”.¹⁰²³

As space is part of the material world, geometry, the mode of inquiry, which is linked to space, does not belong to the study of mental things, the *res cogitans*, but is part of the study of the material world. Second, while Euclidian geometry kept arithmetic (or algebra) and geometry as two distinct modes of operations (or sciences) – arithmetic as deductively operating science of discrete quantities,

¹⁰²⁰ Cf. Rajkovic, 'On Fragments and Geometry', 12.

¹⁰²¹ Elden, *The Birth of Territory*, 291.

¹⁰²² According to Richard Rorty, it is this division, which lies at the heart of the modern - analytic - tradition in philosophy. For a fundamental reconstruction of how the Cartesian Dualism shaped modern imagination (e.g., the separation between science and a 'world out there') as well as criticism of this world view, see Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979).

¹⁰²³ Elden, *The Birth of Territory*, 292 (emphasis in the original).

geometry as science of continuous quantity – Descartes (as well as Leibniz) started to integrate both and, thus, initialised the conversation of arithmetic into geometry (and *vice versa*). What is important here, is that the arithmetization of geometry (often referred to as analytic geometry) made space calculable and carved out the possibly to pursue different projects on a spatial basis.¹⁰²⁴ Thus, following this view of space, political space can be conceptualised as exclusive space. It was in particular Leibniz who introduced in this context the idea of *exclusive jurisdiction*.¹⁰²⁵ And as space has become conceptualised as calculable and connected to the material world, this craved open, what Ford has called (in a Foucault-inspired way), “jurisdictional space” – a space, which is “conceptually open” and should become the condition of possibility for different projects of modern governmentality.¹⁰²⁶

Certainly, these shifts of spatial imaginaries, which should become apparent in the notion of territorial and exclusive jurisdiction, did not immediately change politics and law – and, as I will suggest towards the end of this chapter, there were always exceptions to this image, as for example jurisdiction was even during high modernity never as territorial and exclusive as most scholars in IR and IL made us believe. This links, of course, also to the emerging revisionist historiography of the emergence and transformation of the modern state system.¹⁰²⁷ The main objective

¹⁰²⁴ See, for instance, the first sentences of Descartes’ *Geometry* (first published in 1637): ‘Any problem in geometry can easily be reduced to such terms that a knowledge of the length of certain straight is sufficient for its construction. Just as arithmetic consists of only four or five operations, namely, addition, subtraction, multiplication, division, and the extraction of roots, which may be considered a kind of division, so in geometry, to find required lines it is merely necessary to add or subtract other lines[...]. I shall not hesitate to introduce these arithmetical terms into geometry, for the sake of greater clearness’, Rene Descartes, *The Geometry of René Descartes*, trans. David Eugene Smith and Marcia L. Latham (Chicago: The Open Court Publishing Company, 1925), 2, 5.

¹⁰²⁵ Kratochwil, ‘Of Maps, Law, and Politics’, 8. For example, Leibniz published under the pseudonym Caesarinus Fürstenerius a treatise in which he claimed exclusive jurisdiction for the political sub-units (principalities, duchies, counties, cities) of the Holy Roman Empire. Consequently, he rejected the universal temporal jurisdiction of the Emperor, see Gottfried Wilhelm Leibniz (Caesarinus Fürstenerius), *De jure suprematus ac legationis principum Germaniae*, 1677.

¹⁰²⁶ Ford, ‘Law’s Territory’, 504. This resembles, of course, also the imaginary of the state as container, see Taylor, ‘The State as Container’. And, see of course Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1978-1979* (London: Palgrave Macmillan, 2009).

¹⁰²⁷ Revisionist historiography in IR recently focussed on two fields of inquiry: first, it reconstructed the emergence and transformation of the modern system of states and, second, it concentrated on the early institutional phase of the academic field of IR (on this, see my discussion in chapter 2). In general, this strand of research incorporates a historicist mode of research and tries to debunk modern ‘myths’ by uncovering that neither the history of IR nor the history of the modern state

of this strand of research is to debunk existing ‘myths’ of the discipline of IR with the “Westphalian Myth” being the most significant. Here, revisionist accounts question the common claim of the orthodox mainstream in IR (and IL) that the Peace of Westphalia, involving the treaties signed in Münster and Osnabrück in 1648, represented a fundamental transformation and innovation of the way political authority was organised. For revisionist authors Westphalia was ‘only’ the conclusion of the Thirty Years’ War (and a re-ordering of the inner order of the Holy Roman Empire) and did neither mark the origin of the modern sovereign state nor the system of states but must rather be seen as a continuation of medieval notions of political order and space (as it relied rather on a dynastic than a territorial order).¹⁰²⁸ In other words, “Westphalia was anything but the founding moment of modern international relations”.¹⁰²⁹ Consequently, revisionist accounts locate the foundational moment of modern statecraft later than 1648 – e.g. in the consolidation of the English state in the late seventeenth century¹⁰³⁰ or even in the end of the Napoleonic Wars and the Congress of Vienna (1815).¹⁰³¹

3.3.2 Jurisdiction and Protection: From Right to Fact

Although the formation of the modern nation state should take several centuries and was thus not finalized in 1648, we can nevertheless observe fundamental shifts already in the seventeenth century in how rule through jurisdiction works. As pointed out earlier in this chapter, medieval jurisdiction was often not only non-territorial and non-exclusive (overlapping) but relied also rather on the right (*de jure*) than on the actual capacity (*de facto*) to rule a political entity – the clearest

system is correctly represented by IR’s a-historical mainstream (in particular, neorealism). This resembles, of course, the recent ‘turn to history’ in critical IL scholarship.

¹⁰²⁸ This stream of literature is rather broad. However, see, for instance, Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’, *International Organization* 55, no. 2 (2001): 251–87; Benno Teschke, ‘Theorising the Westphalian System of States: International Relations from Absolutism to Capitalism’, *European Journal of International Relations* 8, no. 1 (2002): 5–48; Benno Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (London: Verso, 2003); Benno Teschke, ‘Debating “the Myth of 1648”: State-Formation, the Interstate System and the Rise of Capitalism - a Rejoinder’, *International Politics* 43, no. 5 (2006): 531–73; Branch, *The Cartographic State*, 125–128; see also the recent discussion on the role and relevance of ‘benchmark dates’, such as 1648, for IR, Barry Buzan and George Lawson, ‘Rethinking Benchmark Dates in International Relations’, *European Journal of International Relations* 20, no. 2 (2014): 437–62.

¹⁰²⁹ Branch, *The Cartographic State*, 128.

¹⁰³⁰ Teschke, ‘Debating “the Myth of 1648”’.

¹⁰³¹ Branch, *The Cartographic State*.

examples were the universal jurisdictions of the Church and the Holy Roman Empire. What we can observe from the mid-seventeenth century onwards is a shift from ‘right to fact’¹⁰³² in the context of jurisdiction and rule more generally. This move also fostered modern statehood and made it a ‘success’ in the struggle with other ‘jurisdictional competitors’ – may they be on the supra-state level (Church and Holy Roman Empire) as well on the sub-state level (such as city states or smaller lordship) or in the colonial context.¹⁰³³ In addition, the state was now able to claim a *monopoly of violence* against non-state actors such as pirates or mercenaries. As a corollary, the binary between public and private sources of violence was established.¹⁰³⁴

The most famous articulation of this shift is certainly Thomas Hobbes’ (1588-1679) *Leviathan* (1651), which was published in the immediate aftermath of the English Civil War (1642-51).¹⁰³⁵ The historical context of the publication is important as it reveals that the *Leviathan* was a direct answer to the personal insecurity, which the Civil War had caused for large groups of the population.¹⁰³⁶ As it is well known, Hobbes’ solution to the problem of insecurity is the creation of a centralised power (a sovereign) guaranteeing by contract *physical* protection to its subjects. Thus, the source of legitimate rule shifted and is not anymore based on a predetermined divine order but on the capacity of a ruler to protect its subjects.¹⁰³⁷ According to Hobbes, other sources of legitimacy than *de facto* jurisdiction stand on a shaky ground, as ultimate moral and theological foundations will always remain contested (again, the English Civil War is the historical context). This becomes also visible in Hobbes’ view on language, which is usually underestimated in interpretations of his work. Hobbes was an advocate of

¹⁰³² Orford, ‘Jurisdiction without Territory’.

¹⁰³³ Cf. Spruyt, *The Sovereign State and Its Competitors*.

¹⁰³⁴ Cf. Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994); and Joaquín Alcaide Fernández, ‘Hostes Humani Generis: Pirates, Slavers, and Other Criminals’, in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 120–44.

¹⁰³⁵ Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Clarendon Press, 2014). For a reconstruction of Hobbes’ ‘*de facto* turn’, see Kinch Hoekstra, ‘The *de facto* Turn in Hobbes’ Political Philosophy’, in *Leviathan after 350 Years*, ed. Tom Sorell and Luc Foisneau (Oxford: Oxford University Press, 2004), 33–73.

¹⁰³⁶ That the *Leviathan* was a direct answer to the political context of the mid-seventeenth century England is also visible in Hobbes’ conception of the state of nature, which shares many similarities with the English Civil War.

¹⁰³⁷ Cf. Orford, ‘Jurisdiction without Territory’, 989–990.

a nominalist view on language, i.e. he claimed that it is not possible to fix by means of language the meaning of words and, as a consequence, the meaning of abstract ideas and narratives – also involving those of the universal jurisdictions of Pope and Emperor.¹⁰³⁸ In other words, the task of the state is not only to overcome the insecurity of the state of nature by providing a monopoly of violence but also to overcome the indeterminacy of the signs of language by functioning as the ‘master of signs’.

Moreover, Hobbes’ work is also interesting for my discussion for one more reason, namely that it stands somehow in the transition between medieval and modern conceptions of jurisdiction and politics. Here, two points are important. First, as Skinner remarks, Hobbes’ account is based on geometry as method (*more geometrico*) and, subsequently, Hobbes introduces “a ‘geometry’ of politics”, which works in accordance with his mechanistic philosophy.¹⁰³⁹ Nevertheless, Hobbes’ notion of geometry differs from the one of Descartes or Leibniz, as he does not follow their proposal of an arithmetization of geometry.¹⁰⁴⁰ Second, the social-contract tradition, which was established by Hobbes, forms more generally a hybrid between personalised and territorial jurisdiction.¹⁰⁴¹ Of course, different authors proposed different solutions in this regard. Hobbes, for instance, directly linked the sovereign, as represented by the artificial person of the *Leviathan*, to its subjects. Thus, jurisdiction is rather jurisdiction over persons, as in pre-modern times, than over territory. Yet on the other hand, territorial jurisdiction plays a crucial role as the sovereign only guarantees its promise to protect within the territorial boundaries of the state. This means also that a state can only secure protection – its promise given in the social contract – if it is able to control a territory and making then “protection [...] a necessary condition for jurisdictional authority over persons”.¹⁰⁴² In contrast to Hobbes, for example, John Locke

¹⁰³⁸ See in particular his chapter ‘Of Speech’ in the first part (‘Of Man’) of the *Leviathan*: Hobbes, *Leviathan*, chap. 4.

¹⁰³⁹ Quentin Skinner, *Vision of Politics: Hobbes and Civil Science*, vol. 3 (Cambridge: Cambridge University Press, 2001), 318.

¹⁰⁴⁰ Cf. Elden, *The Birth of Territory*, 294–295.

¹⁰⁴¹ For a general discussion of this second point, see Abizadeh, ‘Sovereign Jurisdiction, Territorial Rights, and Membership in Hobbes’.

¹⁰⁴² Abizadeh, 428.

emphasised a stronger territorial notion of jurisdiction.¹⁰⁴³ Locke did so as he foregrounded the private law notion of *dominium*. Locke conceptualises the possibility to gain *dominium* as pre-political (through the famous figure of ‘mixing their labours’¹⁰⁴⁴) and, hence, the social contract is signed on the basis of already pre-existing territorial property rights.¹⁰⁴⁵ Yet, the social contract tradition, which represents one of the grand narratives of justification for modern statehood, was never able to dissolve the tension between jurisdiction based on *locus* or on *status* as it always attempted to integrate (and hide the tension thereby) both notions of jurisdiction.

While Hobbes was important for the evolution of the modern statehood by introducing the idea that a political entity can only claim jurisdictional authority if it can guarantee the protection of its subjects, he operated within the confines of the project of absolutism. This is so as Hobbes’ invocation of the ‘artificial’ person of the *Leviathan* translates, of course, into the ‘real’ person of an absolutist ruler. By the (tacit) act of signing the contract, the inhabitants of a territory become the subjects of a ruler and transfer their natural rights – except their right to life (Hobbes even tolerates to take flight from military service) – to the sovereign. Nevertheless, the relationship between the ruler and those who are ruled is different if compared to medieval times where feudalism rather imposed a relationship between ruler and bond-slave. Furthermore, as Kratochwil notes, “[t]he people’ are now no longer the collective name for those who are definitely excluded from politics and the exercise of rule, as in medieval times. They are [now] conceived as the legitimizing source for the public authority”.¹⁰⁴⁶ In this context, the central conceptual innovation was the invocation of the notion of

¹⁰⁴³ John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

¹⁰⁴⁴ ‘Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property’, Locke, 288.

¹⁰⁴⁵ See Abizadeh, ‘Sovereign Jurisdiction, Territorial Rights, and Membership in Hobbes’, 399. In this regard, if Hobbes’ *Leviathan* was an ‘answer’ to the situation in England after the Civil War, Locke’s account should be read as a direct engagement with the question of how to gain *dominium* in the New World. This corresponds also with the way Locke depicts the state of nature as it resembles the historical situation of the first settlers in the New World.

¹⁰⁴⁶ Kratochwil, ‘Of Maps, Law, and Politics’, 11.

‘representation’, which made the absolutist ruler the representative of his/her subjects (those who are represented).¹⁰⁴⁷

3.3.3 Jurisdiction and Representation

It took until the turn of the nineteenth century and the so-called Age of Revolutions until the modern notion of the state and, with it, of jurisdiction was fully established. During this period – particularly in the context of the French Revolution – the state and jurisdiction became ‘impersonalised’ as the notion of the ‘sovereignty of the people’ substituted the still predominant personal rule of absolutism.¹⁰⁴⁸ In addition, nationalism and the invocation of the ‘nation’ started to increase the cohesion of the people within a state. Nations became “imagined communities” whose members shared a common cultural, social, political and territorial identity.¹⁰⁴⁹ For example, the invention of the first national museums falls in this time: these represented public spaces narrating and commemorating the history of a nation – a nation that is located within a certain territory – as a linear timeline with the creation of a certain nation as a logical and natural outcome of some kind of philosophy of history. Put differently, the museum interweaves identity, memory and territoriality.¹⁰⁵⁰ Simultaneously, modern administrative techniques started to develop and also helped to increase the inner coherence of bounded territories (in Europe as well as in the colonies). This development was tightly linked to the arithmetization of space as governmental authorities started to measure everywhere, everything and everyone. For example, statistics became a vital part of the way modern nation states started to govern their territories and establish new forms of authority and power.¹⁰⁵¹ As James C.

¹⁰⁴⁷ As Pitkin points out, Hobbes’ *Leviathan* was ‘the first examination of the idea of representation in political theory’, Hannah Fenichel Pitkin, ‘Representation’, in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russel L. Hanson (Cambridge: Cambridge University Press, 1989), 140.

¹⁰⁴⁸ In the context of political representation, the question is now whether a representative should be completely independent and do what s/he thinks is best (advocated, e.g., by Edmund Burke) or what her/his constituent want (advocated, e.g., by the Federalists), see Pitkin, 142.

¹⁰⁴⁹ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).

¹⁰⁵⁰ See Bartelson, *Visions of World Community*, 111–113.

¹⁰⁵¹ Cf. Foucault, *Security, Territory, Population*; Ian Hacking, *The Taming of Chance* (Cambridge: Cambridge University Press, 1990); and Alain Desrosières, *The Politics of Large Numbers: A History*

Scott adds in this context, “[e]very act of measurement was an act marked by the play of power relations”.¹⁰⁵² But also maps played an important role in this context. The cadastral map, for example, which was already known in the Middle Ages started to develop into an important instrument of statecraft, as it facilitated, e.g., modern taxation regimes. Here again, the performative dimension of maps comes to the fore, as “a state cadastral map created to designate taxable property-holders does not merely describe a system of land tenure; it creates such a system through its ability to give its categories the force of law”.¹⁰⁵³

According to Henri Lefebvre, it was, however, only in the writings of Hegel when the concept of the modern state and with it the idea(l) of territorial and exclusive jurisdiction were concluded. As Lefebvre put it, for “Hegel space brought historical time to an end, and the master of space was the state”.¹⁰⁵⁴ Thus, the state became for Hegel synonymous with the ‘end of history’. It was in this period, when the state became a ‘timeless’ and ‘unquestioned’ condition for the successful organization of societies and politics; and, it was in this period when states became finally conceptualised as “containers”¹⁰⁵⁵ of societies consisting of an inside, where hierarchy, progress and emancipation are possible, and an outside, which is characterised by anarchy and the endless repetition of violence and war.¹⁰⁵⁶

of Statistical Reasoning (Cambridge: Harvard University Press, 2011). This thread is taken up again in Chapter 7, when I discuss the implications of risk indicators for ‘humanity’s law’.

¹⁰⁵² James C. Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), 27.

¹⁰⁵³ Scott, 3. In particular, France started early to develop modern administrative techniques, which relied heavily on cartography, see Branch, *The Cartographic State*, chap. 7.

¹⁰⁵⁴ Henri Lefebvre, *The Production of Space* (Oxford: Blackwell, 1991), 279; see also John Agnew, ‘The Territorial Trap: The Geographical Assumptions of International Relations Theory’, *Review of International Political Economy* 1, no. 1 (1994): 71.

¹⁰⁵⁵ Taylor, ‘The State as Container’.

¹⁰⁵⁶ R. B. J. Walker, *Inside/outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993); but see already also Martin Wight, ‘Why Is There No International Theory?’, in *Diplomatic Investigations: Essays in the Theory of International Politics*, ed. Herbert Butterfield and Martin Wight (London: Allen & Unwin, 1966), 7–34; and Ruggie, ‘Continuity and Transformation in the World Polity’, 274. For a similar periodization, i.e. arguing for a quite ‘late’ starting point of the evolution of world/global politics (late eighteenth/early nineteenth century and not, e.g., ‘Westphalia’), see Mathias Albert, *A Theory of World Politics* (Cambridge: Cambridge University Press, 2016), chap. 3 (coming from a world systems perspective); and Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century* (Princeton: Princeton University Press, 2014) (coming from a global history perspective).

3.3.4 Beyond exclusive and territorial jurisdiction: Loopholes

But, as my discussion of the tension in the social contractarian tradition already indicated, modern state and jurisdiction were never as exclusive and territorial as they were conceptualised during the heydays of modern statehood. In order to illustrate this, let me just briefly specify three ‘loopholes’ of exclusive territorial jurisdiction.¹⁰⁵⁷ These loopholes are usually addressed through the concept of extraterritoriality.¹⁰⁵⁸

First, the institution of diplomacy is closely related to the concept of extraterritoriality. While until the fifteenth century “the alpha and omega of the law of diplomacy” consisted in the personal “inviolability or sacrosanctity” – the latter notion had been developed by Bartolus – of the diplomatic agent, the creation of permanent diplomatic missions during the sixteenth century fostered the “legal device” of extraterritoriality. The notion of extraterritoriality was popularized by Pierre Ayrault, a French lawyer, in the late sixteenth century.¹⁰⁵⁹ Extraterritoriality means in this context that, e.g., the physical buildings of permanent diplomatic missions are provided with exclusive territorial jurisdiction within the receiving country – constituting thus some kind of an enclave.¹⁰⁶⁰ A second view reveals, however, that extraterritoriality is a hybrid form of personal *and* territorial jurisdiction as ambassadors (and their staff and family) as well escape the jurisdiction of the receiving country as they are provided with immunity. The hybrid form of extraterritoriality in the diplomatic context becomes visible, for example, in the concept of the embassy, which is widely used today to describe the physical building of a permanent diplomatic mission but originally denominated the diplomatic delegation itself.

¹⁰⁵⁷ Yet, according to Kratochwil, these ‘loopholes’ stabilize(d) modern sovereignty as ‘background condition’ Kratochwil, ‘Sovereignty as Dominium’, 26. Similarly: Péter D. Szigeti, ‘The Illusion of Territorial Jurisdiction’, *Texas International Law Journal* 52, no. 3 (2017): 369–99.

¹⁰⁵⁸ This discussion will limit itself to historical examples, as I will introduce in the next two chapters contemporary attempts to overcome exclusive territorial jurisdiction.

¹⁰⁵⁹ Arthur Eyffinger, ‘Diplomacy’, in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 820–821.

¹⁰⁶⁰ However, already Oppenheim sharpened this observation and noted: ‘Extraterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term “Extraterritoriality” is nevertheless valuable, because it demonstrates clearly the fact that envoys must in most points be treated as though they were not within the territory of the receiving state’, Lassa Oppenheim, *International Law: A Treatise*, vol. I: Peace (London: Longmans, Green and Co., 1905), 441.

Second, certain crimes became considered as falling under extraterritorial (sometimes also named ‘universal’) jurisdiction, meaning that every state is allowed or even has the obligation to prosecute these crimes. The idea that there are certain crimes, which fall under extraterritorial jurisdiction, is by far older than the modern state and was already articulated in antiquity – best-known in this regard is Cicero’s claim that pirates are enemies of all mankind (*hostes humani generis*).¹⁰⁶¹ In general – although there might be overlaps –, two types of crimes fall *traditionally* under extraterritorial jurisdiction: on the one hand, crimes that seem to undermine states’ monopoly of violence like mercenarism, piracy (privateering) and, later, terrorism;¹⁰⁶² on the other hand, crimes that seem to be so grave that they constitute a threat to humanity as a whole like, e.g., slavery.¹⁰⁶³ In the next two chapters I will continue this discussion when I address recent attempts to extend jurisdictional projects in the context of ‘Humanity’s Law’ and here particularly through the international criminal legal discourse.

Third, although extraterritorial jurisdiction is usually presented as an exception of the rule in international law, this might only be true for the *European* context (and later the ‘Global North’).¹⁰⁶⁴ It means that extraterritoriality has been – and to some extent still is – an important instrument to govern colonial and post-colonial settings. Here, extraterritoriality was used, on the one hand, in the context of the nineteenth-century discussion about ‘standards of civilizations’.¹⁰⁶⁵ In

¹⁰⁶¹ Alcaide Fernández, ‘Hostes Humani Generis’, 120.

¹⁰⁶² For a discussion of the criminalization of piracy and mercenarism in Early Modern Europe, see Thomson, *Mercenaries, Pirates, and Sovereigns*. For an argument that places the origins of international criminal law in the prosecution of piracy, see Simpson, *Law, War and Crime*, chap. 7. On semantic drifts of the notion of the ‘enemy of mankind’, see Wouter Werner, ‘From Justus Hostis to Rogue State the Concept of the Enemy in International Legal Thinking’, *International Journal for the Semiotics of Law* 17, no. 2 (2004): 155–68.

¹⁰⁶³ More recently, we find claims that the anti-slavery movement of the nineteenth century, which was most notably promoted by Britain and the United States, also presents the beginning of modern International Human Rights Law. Cf. Jenny S. Martinez, ‘Antislavery Courts and the Dawn of International Human Rights Law’, *The Yale Law Journal* 117, no. 4 (2008): 550–641. It is, however, important to note that Britain and the United States supported the anti-slavery movement not only for ethical considerations but used it as well as an instrument to weaken other colonial powers.

¹⁰⁶⁴ To be clear: The claim that there existed a *Jus Publicum Europeum* (i.e. an epoche of a European public international law), as prominently presented by Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* is quite misleading. Rather it was, as Fisch puts it, a *Jus Publicum Europaeorum*, a public international law of Europeans, in order to defend European interests, Fisch, *Die europäische Expansion und das Völkerrecht*, 499.

¹⁰⁶⁵ For a general discussion of the role and relevance of the concept of ‘standards of civilization’ in the discourse of international law, see Tanja E. Aalberts, ‘Rethinking the Principle of (Sovereign)

particular, it was used by European states to legally ‘intervene’ in formally independent non-European states such as Japan, Siam, the Ottoman Empire or China. This practice was merely created by the establishment of European courts and other judicially protective activities for Europeans in non-European states. Thus, European citizens could ‘escape’ the jurisdiction of their host country.¹⁰⁶⁶ On the other hand, extraterritoriality was widely used to ‘bring’ the ‘standard of civilization’ to non-European states, particularly from the ‘Global South’, in the context of decolonialisation. Former colonial rulers made wide use of protectorates as did international organizations, particularly the League of Nations and the United Nations, through systems of trusteeship. Hence, colonial powers were able to impose, by direct or indirect means, different projects of governmentality within non-European territories by invoking extraterritoriality (either by creating courts, protectorates or systems of trusteeship) running under the flag of a ‘civilising mission’ and supposing that both colonisers and colonised would benefit.¹⁰⁶⁷

3.3.5 ‘Jurisdiction is Certainly Territorial’ - Legal Positivism and Jurisdiction: *Lotus*

If we turn finally our attention to (high) modern international law, we are confronted with a similar picture. I will dwell on this point only briefly as I will discuss modern jurisdictional practices more comprehensively in the next two chapters.¹⁰⁶⁸ In modern international law the *Lotus* case, which was judged before the Permanent Court of International Justice (PCIJ) in 1927, certainly stands out when it comes to discuss questions of jurisdiction.¹⁰⁶⁹ As Cedric Ryngaert argues,

Equality as a Standard of Civilisation’, *Millennium* 42, no. 3 (2014): 767–89; see also Fisch, *Die Europäische Expansion Und Das Völkerrecht*, 284–348.

¹⁰⁶⁶ Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010); and Anghie, *Imperialism, Sovereignty and the Making of International Law*, 84–87.

¹⁰⁶⁷ For an in-depth analysis of the various practices of governmentality through the League of Nations’ Mandate System, see Anghie, *Imperialism, Sovereignty and the Making of International Law*, chap. 3; on the United Nations context, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

¹⁰⁶⁸ Yet, this discussion links of course also to the jurisdictional conflict between African states, the AU and the ICC, which I outlined at the outset of this chapter.

¹⁰⁶⁹ Permanent Court of International Justice, ‘The Case of the S.S. “*Lotus*”’, in *Publications of the Permanent Court of Justice: Collection of Judgments*, Series A, No. 10, 1927; for a discussion see Ryngaert, *Jurisdiction in International Law*, 30–34.

Lotus “still constitutes the basic framework for questions of jurisdiction under international law” as since “*Lotus*, the PCIJ and the International Court of Justice (ICJ) have not directly addressed the doctrine of (extraterritorial) jurisdiction”.¹⁰⁷⁰

The *Lotus* case presents a jurisdictional case *par excellence* as it deals with an accident of two vessels on the high seas (i.e. beyond the territorial jurisdiction of any state): the mail streamer S.S. *Lotus*, sailing under French flag, and the Turkish collier *Boz-Kourt* collided on 2 August 1926, “just before midnight”.¹⁰⁷¹ The *Boz-Kourt* sank and eight Turkish nationals died. The *Lotus* arrived in Constantinople on the next day and its French officer of the watch was first arrested by Turkish authorities and later convicted by a Turkish criminal court. France protested against the decision and agreed with Turkey to bring the case to the PCIJ in order to decide whether the Turkish criminal court had jurisdiction over the case or not.¹⁰⁷² In a close judgement, decided by president Max Huber’s casting vote only – the votes had been equally divided –, the PCIJ rejected in September 1927 France’s position. The PCIJ argued that there was no rule under international law prohibiting the installation of a criminal trial by the Turkish authority. Thus, according to the PCIJ sovereign states are allowed to act as they wish as long as their behaviour is not explicitly prohibited by international law. This means that international law represents a horizontal legal order between independent states, which is based on the ‘free will’ of states (voluntarism).¹⁰⁷³ In this context, the PCIJ stated in its judgement that

¹⁰⁷⁰ Ryngaert, *Jurisdiction in International Law*, 30.

¹⁰⁷¹ Permanent Court of International Justice, ‘*Lotus*’, 10.

¹⁰⁷² For more details, see Permanent Court of International Justice, 10–12.

¹⁰⁷³ On a side note: *Lotus* could thus be understood as one enunciation of an important transformation, that occurred from the second half of the nineteenth century onwards and that was summarized by Duncan Kennedy as follows: “The “subjects” of municipal law include “persons”, but the “subjects” of international law [...] only “sovereigns”. Citizens as citizens had no right at all under international law. If they had no rights under international law, then sovereigns, and in particular powerful sovereigns, had no legal basis for interfering with the way independent states treated their citizens. This was the globalization of a legal consciousness with which a basic structural trait was that jurisdiction must not be global. The people doing the receiving were legal elites scattered around the world. They were closely integrated with, but not everywhere identical with, the political and economic elites of their respective countries. Receiving [Classical Legal Thought] permitted a gesture of striking cosmopolitanism, without any sacrifice of local autonomy’ Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850-2000’, in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2006), 31.

“[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed”.¹⁰⁷⁴

In the paragraph, immediately following this famous formulation, the court addresses the question of jurisdiction and claims that jurisdiction is territorial and exclusive:

“Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense *jurisdiction is certainly territorial*”.¹⁰⁷⁵

However, this opens up a paradoxical situation as a state would be bound by international law within its own jurisdiction while, on the other hand, international law accepts the exclusive jurisdiction of states within their territories. The sovereign equality of states stands in tension with the ‘free will’ of states. Thus, one paragraph later the PCIJ presents the following solution:

“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case

¹⁰⁷⁴ Permanent Court of International Justice, ‘Lotus’, 18.

¹⁰⁷⁵ Permanent Court of International Justice, 18–19 (emphasis added).

under international law it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable".¹⁰⁷⁶

In other words, the PCIJ attempts to solve the rather paradoxical situation of exclusive jurisdiction by distinguishing between – what should later be called – ‘prescriptive’ and ‘enforcement’ jurisdiction. A state is not allowed to use coercive means outside its territory (enforcement jurisdiction) but is permitted to prescribe rules to ‘persons, property or acts’ extraterritorially as long as these rules are not explicitly prohibited by international law.¹⁰⁷⁷

The discussion of *Lotus* points also to the fact that states have traditionally claimed jurisdiction not only on the basis of territoriality. If we look today into textbook accounts of international law, we are usually confronted with a couple of principles which could serve as a foundation for states to claim jurisdiction (i.e., how jurisdiction can be ‘allocated’):¹⁰⁷⁸ still most importantly, the *territoriality* principle, i.e. “a state has jurisdiction over everything materialising on its own territory”;¹⁰⁷⁹ the *active nationality* principle, i.e. jurisdiction over all nationals; the *passive nationality* (or *personality*) principle, i.e. jurisdiction over any person who has somehow harmed one of its nationals; the *protective* principle, i.e. jurisdiction over states or persons who threaten a state’s core interest or national security; the *universality* principle, i.e. jurisdiction over acts of persons anywhere in the world if they commit international crimes;¹⁰⁸⁰ and *treaty-based extension* of jurisdiction, i.e.

¹⁰⁷⁶ Permanent Court of International Justice, 19.

¹⁰⁷⁷ Cf. Ryngaert, *Jurisdiction in International Law*, 31; and Roger S. Clark, ‘Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus’, *Criminal Law Forum* 22, no. 4 (2011): 528–530; but see also the discussion in Staker, ‘Jurisdiction’, 313–315.

¹⁰⁷⁸ For example, Staker, ‘Jurisdiction’, 311–326; Simma and Müller, ‘Exercise and Limits of Jurisdiction’, 137–146; and Ryngaert, *Jurisdiction in International Law*.

¹⁰⁷⁹ Simma and Müller, ‘Exercise and Limits of Jurisdiction’, 137.

¹⁰⁸⁰ For example, in the Arrest Warrant case the Democratic Republic of Congo complained against Belgium before the ICJ. In 2000, Belgium had issued an international arrest warrant against Abdoulaye Yerodia, the Democratic of Congo’s Foreign Minister at this time. The Belgian judiciary

resulting from a voluntarist perspective on international law every special treaty between two or more states can modify jurisdictional issues between them.

4. Conclusion

This chapter aimed to theorize and problematize the concept of jurisdiction in the discourse of international law and politics. To locate the concept within the wider discourse of *international law and politics* implies already challenge the widespread opinion (shared, e.g., by the ICC as we have seen at the outset of this chapter) that jurisdiction is a rather technical and non-political term – a legal technicality *par excellence*. Moreover, jurisdiction is usually conceptualised as exclusive and territorial – making it one of the central pillars of modern statehood. In order to critically engage with this understanding of jurisdiction, I followed in this chapter two – I think complementary – strategies.

In the first part of the chapter, I introduced a number of recent critical scholarship, which – although coming from different disciplinary as well as conceptual and theoretical backgrounds – started to take the concept of jurisdiction as a key concept that is in need of further inquiry in order to better understand the politics of (international) law. As we have seen, these literature present jurisdiction as a social practice (Ford) and as a political category (Kaushal), they reflect the spatio-temporal embeddedness of jurisdiction when they study it as a ‘chonotope’ (Valverde) and they show how a problematization of jurisdiction might link to broader discussions on ‘(global) legal pluralism’ (Berman) and a ‘postmodern conception of international law’ (de Sousa Santos).

In the second part of the chapter, I problematized the concept of jurisdiction by historicising it. Historicising jurisdiction helped me to show that jurisdiction

accused Yerodia of having provoked massacres of Tutsi civilians. As Belgium is one of the few countries claiming universal jurisdiction for grave crimes, its judiciary issued the arrest warrant without Belgium having a direct link to the offences or to the offender. The ICJ decided that Belgium violated international law and demanded to close the arrest warrant. However, the ICJ tried to circumvent the question of universal jurisdiction as the decision was grounded on the Foreign Minister’s immunity and, thus, left the question of universal jurisdiction aside. International Court of Justice, ‘Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)’, in *ICJ Reports*, 2002.

was not always exclusive and territorial as modern international law and politics make us believe. The historical reconstruction focussed on a number of contingent and intertwined developments particularly with regard to forms of rule, shifts in legal vocabularies and representations of space (e.g., through maps). Historically speaking, the chapter addressed three important episodes in the history of the concept of jurisdiction, namely the different (mostly non-territorial and non-exclusive) forms of medieval jurisdiction, the transition from the medieval to the early modern period in Europe and the consolidation of exclusive territorial jurisdiction in the context in the project of modern statecraft. Thereby, the chapter showed that the ‘making’ of the modern nation state and exclusive territorial jurisdiction was a long – contingent and singular – process that might never been fully concluded as most of IR and IL make us believe; rather it is a process without finality, teleology and/or necessity. There is neither a clear foundational date of the modern state (system) nor is there a trans-historically and cross-culturally valid logic of it. Consequently, the chapter showed also that it might be problematic to think of jurisdiction in strict binaries such as territorial/non-territorial or exclusive/non-exclusive as jurisdictional practices are located in-between (even high modernity has its loopholes and paradoxes). Rather the binaries territorial/non-territorial or exclusive/non-exclusive should be conceived as gradual and fluent. Finally, the chapter showed that debates about jurisdiction were involved in many political projects with – from our point of view – the making of the modern territorial nation state as its most important one. It turned out then that the nation state itself provided the platform for several political projects. But what happens if the political project of the nation state is under fire, as it seemed recently?

In order to study these possible transformations, in particular the transformations associated with the emergence of ‘humanity’s law’, I will advance in the two remaining chapters a *non-territorial, post-Cartesian, multidimensional and non-exclusive notion of jurisdiction*. Let me briefly explain what I mean by this.

- (1) *Non-territorial*. As I have reconstructed in this chapter, the notion of jurisdiction is, since the transition from medieval forms of rule to modern ones, deeply linked to territoriality. Modernity’s main project of rule, the

nation state, is based on the idea that jurisdiction is territorial. Similarly, the ‘international’ – in all its different guises – is usually imagined in terms of territoriality.¹⁰⁸¹ This means that the international is perceived as compartmentalized into its various territorial nation states. International law in turn is supposed to ‘govern the relations between independent states’. However, the concept of humanity challenges this imaginary. Humanity does not need territoriality – it is even a project that attempts to transcend it. The politics of humanity involves therefore the questioning and even dissolving of the ‘tight link between space and territory’, which is the condition of possibility for the modern notion of jurisdiction and statecraft. Without being necessary a prefigurement of a ‘new medievalism’, jurisdictional projects of ‘humanity’s law’ nevertheless resemble rather the jurisdiction of the medieval Pope than of the modern territorial nation state.¹⁰⁸²

- (2) *Post-Cartesian*. Not only the ‘tight link between territoriality and space’ is increasingly under pressure. Even the concept of space itself seems to be under scrutiny. As I pointed out, modern space, and this is also the case for the space of modern jurisdiction, is Cartesian space. On the one hand, the Cartesian notion of space introduced the idea of ‘exclusivity’ into ‘exclusive’ jurisdiction. Yet, on the other hand, Cartesian space is always already extended space (*res extensa*). This means that the modern ‘politics of jurisdiction’ is about the division of an already existing, i.e. fully extended, space. This is of course the way modern ‘international’ politics is imagined. However, it is not necessary to conceptualise space in this way. For example, Bruno Latour recently started to problematize the Cartesian notion of space and argued that it was the “Nazi legal scholar” Carl Schmitt, the “toxic and nevertheless indispensable Carl Schmitt”, who in his “oddly titled” book *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* [The Nomos of the Earth in the International Law of Jus Publicum

¹⁰⁸¹ In this regard, Luhmann’s concept of ‘world society’ is, again, an important exception. According to Luhmann the emergence of ‘world society’ is linked to functional differentiation and substitutes the segmentary differentiation into territories, which is constitutive of the international system, Niklas Luhmann, ‘Die Weltgesellschaft’, *Archiv für Rechts- und Sozialphilosophie* 57, no. 1 (1971): 1–35.

¹⁰⁸² Cf. Orford, ‘Jurisdiction without Territory’.

Europaeum]¹⁰⁸³, most-profoundly questioned the modern imaginary of space.¹⁰⁸⁴ According to Latour, Schmitt conceptualises *space as extending, not as something that is already extended*. Thus, space becomes „the provisional result of a phenomenon of expansion, of spacing, of gained ground, which depends on other political and technical variables. For him, as for more recent historians of sciences, the *res extensa* is not a space *in which* politics is situated – the background of the map of every geopolitics – but, rather, something that is generated by political action itself aided by its technological instrumentation. In other words, for him [...] space is the offspring of history“.¹⁰⁸⁵ If we conceive space in this way, the politics of jurisdiction is not only about the allocation of jurisdiction within a pre-given bounded space but also about the making and generating of new modalities of spatial (and, not only spatial) thinking. Jurisdictional projects expand and thereby create space (time, subjectivity, agency, causality, etc.). Thus, they are projects of connectivity.¹⁰⁸⁶

- (3) *Multidimensional*. If jurisdiction is neither bound anymore to territoriality nor to the Cartesian notion of space, but is conceptualised instead as extending, other, namely non-spatial, modes of extension come to the fore.¹⁰⁸⁷ One important mode of extension is certainly extension through time (meaning also: not only in time). This links, of course, to Mariana Valverde's suggestion to study jurisdiction as *chronotope*.¹⁰⁸⁸ As such, the shift from past-oriented logics to more future-driven logics of international legal argumentation (e.g., in risk-based rationalities) has jurisdictional effects. They are jurisdictional projects that extend by colonizing the future (and this has in turn also consequences for the spatial extend of

¹⁰⁸³ Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*.

¹⁰⁸⁴ Bruno Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime* (Cambridge: Polity, 2017), 228, 229.

¹⁰⁸⁵ Latour, 231 (emphasis in the original).

¹⁰⁸⁶ Latour's critique is even more radical, as he points out that not only the modern international but also our idea of globality rests on a Cartesian notions of space. See Bruno Latour, 'Onus Orbis Terrarum: About a Possible Shift in the Definition of Sovereignty', *Millennium* 44, no. 3 (2016): 305–20. See also my discussion: Filipe dos Reis, 'Wir sind nie global gewesen. Latour, Die Internationalen Beziehungen und die (Geo)Politik der Diplomatie', in *Der große Leviathan und die Welt der Ameisen. Zum Staatsverständnis Bruno Latours und der Akteur-Netzwerk-Theorie*, ed. Hagen Schölzel (Baden-Baden: Nomos, forthcoming).

¹⁰⁸⁷ This links of course also to my earlier discussion of treating the extension of academic disciplines in terms of jurisdiction.

¹⁰⁸⁸ Valverde, *Chronotopes of Law*.

jurisdiction). As I will argue in Chapter 7, recent attempts to extend the jurisdictional project of the responsibility to protect are tied to future-oriented forms of legal argumentation. Yet, there are even other forms of extension. For example, in Chapter 6 I will reconstruct how projects of international criminal law attempt to extend *inter alia* by means of material jurisdiction (*ratione materiae*), i.e. by adding crimes to the catalogue of international criminal law and thereby negotiating its boundary.

- (4) *Non-Exclusive*. Leaving a Cartesian-inspired notion of space and jurisdiction behind implies finally that jurisdiction can be conceptualised as non-exclusive. Rather different jurisdictional projects (their spatialities, temporalities, subjectivities, etc.) interact, intersect, overlap, clash and hybridize. In this context, various authors pointed to the increasing difficulty to depict law, jurisdiction and authority by means of maps. The typical two-dimensional maps of modernity seem to work less and less.¹⁰⁸⁹

¹⁰⁸⁹ This is, for example, observed in: de Sousa Santos, 'A Map of Misreading'; William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), chap. 6; Valverde, *Chronotopes of Law*, 58; and Szigeti, 'The Illusion of Territorial Jurisdiction', 394.

Chapter 6: *How to Make an International Crime: Of Judges, Lawyers and Academics*

*“The man who judges the criminal is really the master of society”*¹⁰⁹⁰

*“You go beyond the black letter law because you look at the spirit of law”*¹⁰⁹¹

1. Introduction

The previous chapter problematized, theorized and historicized the concept of jurisdiction in the discourse of international law and politics. By following the emerging critical scholarship on jurisdiction, I suggested that focusing on jurisdictional practices tells us much about the way politics works in today’s world society. This is because different projects of jurisdiction are connected to different projects of power and authority. Yet, in scholarship (‘critical’ as ‘mainstream’) these jurisdictional practices are usually underrated and understudied, although, as Orford stresses, the “process of claiming jurisdiction is a form of alchemy. A successful claim of jurisdiction transforms power into authority, or fact into right”.¹⁰⁹² This observation also links to my previous discussion (Chapter 4), which centred on the significance to study the work of international legal experts and their use of legal technicalities – with jurisdiction being one of these technicalities. As I pointed out in Chapter 5, historically speaking, today’s prevalent notion of jurisdiction in international law, i.e. exclusive and territorial jurisdiction, is a relative newcomer as it is closely related to the emergence of the modern (system of) state(s). However, as I noted towards the end of Chapter 5, in practice modern jurisdiction was never as exclusive and territorial as imagined in theory. There were always and still are several loopholes – from the prosecution of *hostes humani generis* to the extraterritorial jurisdictional practices of European (post)colonial powers in the non-European parts of the world to the development

¹⁰⁹⁰ Alexis de Tocquille, *Democracy in America* (Chicago: The Chicago University Press, 2000), 260.

¹⁰⁹¹ Antonio Cassese, Heikelina Verriijn Stuart, and Marlise Simons, ‘The Judge: Interview with Antonio Cassese’, in *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings*, ed. Heikelina Verriijn Stuart and Marlise Simons (Amsterdam: Amsterdam University Press, 2009), 53.

¹⁰⁹² Anne Orford, ‘Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect’, *Michigan Journal of International Law* 30 (2009): 1013.

of non-territorial principles such as the nationality principle(s) or various forms of treaty-based extensions of jurisdiction.

Yet, more important – and this is the starting point for this chapter – is the observation that we witness in recent years several projects to leave the grounds of territorial and exclusive jurisdiction not only in exceptional circumstance (at least if we look at the ‘Western’ parts of the world) pushing, e.g., towards universal forms of jurisdiction in certain issue areas on a permanent and at-large basis. These projects are often embedded in and pursued through the vocabulary of the various streams of ‘humanity’s law’. In this chapter, I will concentrate on one field of international legal and political practice where such attempts have been particularly widespread: the wider discourse of international criminal law and justice.¹⁰⁹³ Although, as I have already highlighted at the outset of the previous chapter, today’s main organ of international criminal law, the ICC in the Hague, is governed by the principle of complementary; and, although the jurisdiction of the ICC is limited only to its member states (and, thus, presents *stricto sensu* a form of treaty-based extension of states’ jurisdiction), it is the notion of *universal jurisdiction* attributed to an international criminal court or tribunal that always looms large at the horizon of international criminal justice and law as a whole. Seen from this perspective, international criminal law and justice is an exemplary case for a more general *politics of universality*.¹⁰⁹⁴

If we go now into further detail, jurisdiction in international criminal law is usually discussed vis-à-vis the following four jurisdictional principles (or dimension):¹⁰⁹⁵ jurisdiction *ratione temporis*, dealing with the question whether jurisdiction is curtailed by the passage of time (e.g., the issue of *ex post facto* jurisdiction and the retroactivity of law); jurisdiction *ratione loci*, dealing with the question of the territorial scope of jurisdiction; jurisdiction *ratione personae*,

¹⁰⁹³ I use the terms ‘international criminal law’, ‘international criminal justice’ and ‘international criminal law and justice’ interchangeable in this chapter. Moreover, the next chapter moves then to the intersection of international criminal law and the intervention discourse.

¹⁰⁹⁴ For further discussion, see, e.g., Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), 36–37; I borrow the term ‘politics of universality’ from Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

¹⁰⁹⁵ These principles should not be confused with the principles of jurisdiction in international law in general (on these principles see my discussion towards the end of the previous chapter).

dealing with the question of which groups of persons fall under a jurisdiction; and, jurisdiction *ratione materiae*, dealing with the question which crimes are subject of jurisdiction.¹⁰⁹⁶ What also becomes visible in this context is the flexibility of the concept of jurisdiction as well as the added value of studying it: *by focusing on the different principles of jurisdiction we are able to accurately reconstruct the extent and extension of the scope and authority of international criminal law and justice in a multi-dimensional way.* To look at jurisdiction on this way signifies of course to follow a non-territorial, post-Cartesian, multidimensional and non-exclusive notion of jurisdiction, as advanced in the previous chapter. In other words, we are on the one hand able to move beyond a solely territoriality-focused analysis of jurisdiction, which would encompass jurisdiction *ratione loci*, as we are on the other hand able to grasp the interplay of different principles of jurisdiction. For instance, we can scrutinize now the boundaries of international criminal law and justice by focusing on debates about whether certain groups fall under the jurisdiction of a court by studying, e.g., which kind of nationality principle is applied or whether leading politicians should enjoy immunity (all questions concerning jurisdiction *ratione personae*); or we can focus on the question of whether there exists a temporal threshold for the prosecution of certain crimes or not – something which the Nuremberg and Tokyo Tribunals after the Second World War rather denied while the ICC only prosecutes crimes committed after the Rome Statute's entry into force in 2002 (and in the case of the Crime of Aggression even only 2017). In the current chapter I will focus only on one dimension of jurisdiction, the jurisdiction *ratione materiae*, i.e. the question of which crimes are or should be part of international criminal law.

The question of what constitutes a crime under international criminal law, i.e. an *international crime*, lies at the core of international criminal law and justice. Already the first article of the Rome Statute of the ICC makes reference to international crimes. The whole article states the following:

¹⁰⁹⁶ For further discussion, see the respective chapters in Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (Oxford: Oxford University Press, 2002).

“An International Criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have to exercise its jurisdiction over persons for the *most serious crimes of international concern*, as referred to in this Statute, and should be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”.¹⁰⁹⁷

Later, in Article 5, the Statute speaks of “the most serious crimes of concern to the international community as a whole” and lists four crimes: “(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression”.¹⁰⁹⁸ These crimes are further specified in the subsequent Articles 6 to 8 as well as in an *addendum*, the so-called Elements of Crimes.¹⁰⁹⁹ It is important to note for our purpose that each of these crimes has its own (intellectual) history. The same holds true for the inclusion of certain crimes into the Rome Statute and the exclusion of others.¹¹⁰⁰ As we will see, these histories are often deeply intertwined with the work of leading international legal experts – in particular, legal academics.¹¹⁰¹

Legal academics are an interesting and “hugely influential” group of experts in the context of international criminal law and justice as their field of work is not

¹⁰⁹⁷ International Criminal Court (ICC), ‘Rome Statute of the International Criminal Court’, A/CONF.189/9 (1998), para. 1 (emphasis added).

¹⁰⁹⁸ International Criminal Court (ICC), para. 5.

¹⁰⁹⁹ International Criminal Court (ICC), 6–9; Preparatory Commission for the International Criminal Court, ‘Finalized Draft Text of the Elements of Crimes’, UN Doc. PCNICC/2000/INF/3/Add.2 (2000).

¹¹⁰⁰ On the exclusion of certain crimes from the Rome Statute, see Patrick Robinson, ‘The Missing Crimes’, in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, vol. 1 (Oxford: Oxford University Press, 2002), 497–525.

¹¹⁰¹ This points also to the fact – for some it may constitute a problem – that there is no common understanding of what the concept of ‘international crimes’ actually means – the concept itself is ‘indeterminate’ as it is ‘essentially contested’. As, for example, Roger O’Keefe notes, ‘[i]nternational crimes occupy a central place in international criminal law, yet there is no agreement as what is meant by an “international crime”. No common understanding, let alone common definition of the concept exists’. For O’Keefe, this is unproblematic as the ‘practical consequences of a lack of agreement as to the notion of an international crime are not great’ and as ‘[y]ou know one when you see it’. Roger O’Keefe, *International Criminal Law* (Oxford: Oxford University Press, 2015), 47, 56. On the one hand, the present chapter follows this more pragmatic approach to some extent, as it does not offer a stipulative definition of what the notion of international crimes ‘really’ means (and rather reconstructs its use in different contexts); on the other hand, however this chapter argues that it makes a difference how the notion of ‘international crimes’ is used as this also determines the scope of the ‘catalogue’ of crimes and thus the scope of international criminal law’s jurisdiction in general.

only restricted to the confines of academia.¹¹⁰² This group of experts often ‘changes hats’ as it rotates between different positions inside and outside academia. Inside academia – at least this seems, as Christine Schwöbel observes, to be the case in international criminal law – they disseminate and advertise their respective legal project(s) through teaching (e.g., creating new LL.M. programs) and research (e.g., establishing new academic journals).¹¹⁰³ Outside academia they work as legal advisers for foreign ministries, in international organizations and commissions, for non-governmental organisations and in advocacy or are appointed as judges of international courts and tribunals.¹¹⁰⁴ As a consequence, they trespass what Bourdieu once called the “structural hostility” between theoreticians and practitioners and what he believed of being a constitutive feature of the ‘judicial field’.¹¹⁰⁵ This double function between theory and practice allows legal academics also to foster the extension of their field – both in the context of jurisdictional conflicts between different disciplines (and within their own discipline) in academia as in the application of law outside of the university sector.¹¹⁰⁶ In a nutshell, legal academics in the field of international criminal law

¹¹⁰² Mikkel Jarle Christensen, ‘Academics for International Criminal Justice: The Role of Legal Scholars in Creating and Sustaining a New Legal Field’, *iCourt Working Paper* 14 (2014).

¹¹⁰³ According to Schwöbel, this trend to advertise one’s own field of inquiry silences critical perspectives in scholarship on international criminal law. She describes the political economy in academia as follows: ‘So long as academics respond to the market by supplying ICL teaching (and this author is no exception), they are arguably pursuing a particular self-interest. The consumers in this market are largely students, rather than criminals. The number of students interested in ICL has risen exponentially. Specialised ICL courses have been established, particularly in The Netherlands, on a large scale to meet this new demand. We are of course to a certain extent all bound up in making our disciplines appear attractive and interesting, but it appears that there is a real fear that a critical engagement with ICL could either undermine the entire area of international law, give the impression of being in favour of violence, or at the very least spoil the glow of success for others. It is therefore tempting to become complicit in making the discipline appear more relevant, to focus on the detail rather than that which informs the discipline at large’, Christine E. J. Schwöbel, ‘The Comfort of International Criminal Law’, *Law and Critique* 24, no. 2 (2013): 169–91.

¹¹⁰⁴ Koskeniemi lists judges, advisers, activists and academics as different roles for international lawyers, Martti Koskeniemi, ‘Between Commitment and Cynicism: Outline of a Theory of International Law as Practice’, in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York: United Nations, 1999), 495–523. Isabel Feichtner differentiates between activists, practitioners and scholars, Isabel Feichtner, ‘Realizing Utopia through the Practice of International Law’, *European Journal of International Law* 23, no. 4 (2012): 1151–1152. For an analysis of self-descriptions by legal experts, who occupy these roles, see Anne Peters, ‘Rollen von Rechtsdenkern und Praktikern - Aus völkerrechtlicher Sicht’, *Berichte der deutschen Gesellschaft für Völkerrecht* 45 (2012): 168–71.

¹¹⁰⁵ Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, *Hastings Law Journal* 38 (1986): 821. See also my discussion on Bourdieu’s analysis of law and legal expertise in Chapter 4.

¹¹⁰⁶ Cf. Christensen, ‘Academics for International Criminal Justice’.

are a perfect example of the way David Kennedy describes experts, namely as ‘people with projects’ or ‘people pursuing projects’.¹¹⁰⁷

International criminal law and justice is, in particular, an interesting field to study international legal experts as individuals, i.e. as *individual* ‘people with projects’. This is due to the structure of the international criminal legal discourse, which both individualises and is individualised. International criminal law and justice *individualises*, as it is this discourse (perhaps together with international human rights law), which brought the individual to the centre stage of the previously state-centred discourse of international law. As such international criminal law and justice attributes individual criminal responsibility to individuals (perpetrator) for committing (collective) crimes to individuals (victims). Consequently, international criminal courts and tribunals are the sites where this kind of individualisation takes place. For example, in the ICTY trial against former Serbian leader Slobodan Milosevic such a position was clearly articulated by Prosecutor Carla Del Ponte in her opening statement on 12 February 2002:

“The accused in this case, as in all cases before the Tribunal, is charged as an individual. He is prosecuted on the basis of his individual criminal responsibility. No state or organisation is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crimes, even the crime of genocide. It may be tempting to generalise when dealing with the conduct of leaders at the highest level, but that is an error that must be avoided. Collective guilt forms no part of the Prosecution case”.¹¹⁰⁸

Such attempts to attribute responsibility to individuals have, moreover, caused various controversies since the emergence of modern international criminal law.¹¹⁰⁹ For instance, there are debates on how to deal with joint criminal enterprises (JCE) – as international crimes are usually collective crimes – or

¹¹⁰⁷ For more detail, see my discussion of Kennedy’s own academic project in Chapter 3 and on the way he conceptualises expertise in Chapter 4.

¹¹⁰⁸ As cited in Simpson, *Law, War and Crime*, 64.

¹¹⁰⁹ See, for instance, the discussion in Kirsten Ainley, ‘Excesses of Responsibility: The Limits of Law and the Possibilities of Politics’, *Ethics & International Affairs* 25, no. 4 (2011): 407–31.

whether a regular soldier can plead superior order when charged with war crimes. Moreover, the discourse of international criminal law and justice is also highly *individualised* as its narratives are often told as *personal projects* of a few protagonists – almost Herculean struggles of a hand full of individuals fighting a ‘culture of impunity’ (seemingly caused by a state-centric international law). In this context the work and life of early academics and activists such as Hersch Lauterpacht and Rafael Lemkin has been subject to quasi-biographical studies;¹¹¹⁰ the histories of the post-Second World War trials were reconstructed in movies and documentaries as the personal histories of the Prosecutors Ben Ferencz or Robert Jackson;¹¹¹¹ in a similar vein, more recently, for example, former ICTY Prosecutor Carla Del Ponte published her memoirs¹¹¹² as there were screened several documentaries which prominently addresses the projects of ICC’s former Chief Prosecutor Luis Moreno Ocampo and current Chief Prosecutor Fatou Bensouda.¹¹¹³

This chapter takes as its vantage point this second observation, namely that the international criminal legal discourse is highly individualised and operates on the basis of personal projects of international legal experts. In particular, it focuses on the role of two international legal experts – of two ‘people with projects’ – in the making of international crimes: Hersch Lauterpacht’s (1897-1960) role in the making of ‘crimes against humanity’ and, to a larger extent, Antonio Cassese’s (1937-2011) recent – and until today basically unsuccessful – attempt to make

¹¹¹⁰ See, in particular, Philippe Sands wonderful and very personal reconstruction of the role of Lauterpacht and Lemkin in the making of international criminal law, Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (London: Weidenfeld & Nicolson, 2016); on Lemkin see also Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002).

¹¹¹¹ US Chief Prosecutor at the *Einsatzgruppen Trial*, Ben Ferencz was, for example, portrayed recently in the documentaries *Watchers of the Sky* (Propeller Films, 2014) and *A Man Can Make Difference* (W-Film, 2015); while US Chief Prosecutor at the IMT in Nuremberg, Robert Jackson (played by Alec Baldwin) is the main character in the two-part television docudrama *Nuremberg* (Warner Home Video, 2000)

¹¹¹² Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity: A Memoir*, English language ed (New York: Other Press, 2009).

¹¹¹³ For an in-depth analysis of these documentaries see Wouter Werner, “‘We Cannot Allow Ourselves to Imagine What It All Means’: Documentary Practices and the International Criminal Court’, *Law and Contemporary Problems* 76, no. 3–4 (2013): 319–39; see also Wouter Werner, ‘Justice on Screen – A Study of Four Documentary Films on the International Criminal Court’, *Leiden Journal of International Law* 29, no. 4 (2016): 1043–60.

‘international terrorism’ an international crime.¹¹¹⁴ Both Lauterpacht and Cassese were two of the most influential scholars in international law and both worked additionally as legal experts outside of academia. By treating Lauterpacht and Cassese as ‘people with projects’ and the above mentioned crimes as projects I do neither situate this study in the soft-constructivist literature on ‘norm entrepreneurs’¹¹¹⁵ nor am I interested in what Lauterpacht and Cassese ‘really’ thought, i.e. to ‘look into their heads’ in order to grasp what their ‘intentions’ were.¹¹¹⁶ In this regard, I rather follow Gunther Teubner’s discussion of ‘actors’ in (private) international law:

“As social constructs, they are indispensable to legal communication, because law as a social process needs to attribute communication to actors (individual or collective ones) in order to continue self-reproduction. But these ‘actors’ are only role-bundles, character-masks, internal products of legal communication. The densely populated world of legal persons, the plaintiffs and defendants, the judges and legislators, the parties to a contract, the corporations and the state, is an internal invention of the legal process”.¹¹¹⁷

¹¹¹⁴ Here, the history of the crime of genocide and the crime of aggression could have been included as well. The history of genocide is deeply linked with the legacy of Rafael Lemkin. Lemkin even coined the word ‘genocide’ in 1944. As a consequence of Lemkin’s activism ‘genocide’ was included in the indictment of the British Prosecutor at the Nuremberg trial and, later, Lemkin was involved in the drafting process of the Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted at the UN General Assembly in 1948. For further details on the role of Lemkin in the making of genocide, see Power, *A Problem from Hell*. The early history of the crime of aggression was, at least to some extent, linked to the work of Quincy Wright, whose general approach I have introduced in Chapter 2. Wright emphasised the need to ‘outlaw war’ (i.e. to make aggression an international crime) both after the First World War (with regard to the German Kaiser) as well as after the Second World War (with regard to Germany and Japan). See the discussion in Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge: Cambridge University Press, 2012), 188–198.

¹¹¹⁵ For a recent analysis drawing on such a framework in the field of human rights law, see Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton & Co, 2011).

¹¹¹⁶ This is at least the case as long as - as it is usually assumed - that intentions are something ‘objective’, namely, as for example Stanley Fish puts it, when ‘intention anchors interpretation in the sense that it stands outside and guides the process’. Rather Fish suggests a different (in my view more convincing) avenue when he points out that ‘intention is an interpretive fact, that is, it must be constructed; it is just that is impossible *not* to construe it and therefore impossible to oppose either to the production or the determination of meaning’, see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 100.

¹¹¹⁷ Gunther Teubner, ‘How the Law Thinks: Towards a Constructivist Epistemology of Law’, *Law & Society Review* 23, no. 5 (1989): 741 (references omitted).

Or, to put it differently, I treat international legal experts and their respective projects similar to conceptual shifts in a semantic field. To reconstruct 'Lauterpacht' and 'crimes against humanity' or 'Cassese' and 'international terrorism' works from a methodological point of view similar to reconstruct, say, the use of the concept 'state' in fifteenth century 'Italy'.

This strategy comes with three qualifications: First, I am not interested in judging whether it is good or bad that scholars become judges, members of commissions or activists (and vice versa). Indeed, that legal experts change hats is quite 'normal' in (international) law as it is 'normal' for legal scholars that they do not situate their academic work strictly outside the field of legal practice.¹¹¹⁸ Quite the opposite is the case as their scholarly work can even serve as 'source' of international law and is thus 'officially' part of legal practices – not to mention more complex "looping effects" between academia and practice, e.g., by teaching the next generation of lawyers or through publications, which address a general public.¹¹¹⁹ In the end it is rather this permanent rotation between the inside and the outside of academia, which stabilizes the international legal field (i.e., 'dynamic stabilisation'); and to reconstruct how experts move between different positions, roles and functions helps to better understand how international argumentation actually works. Second, this implicates also that this chapter does not address the question whether 'crimes against humanity' or – more contested – 'international terrorism' are *really* international crimes. In this regard, this chapter is only descriptive as it intends to 'follow' different international crimes in various contexts. Finally, it is also descriptive for another reason, namely I will not discuss *in extenso* possible success conditions, i.e. why a certain crime did become an *international* crime and another did not. In this last regard I will limit myself to a few speculations towards the end of the chapter.

¹¹¹⁸ Cf. Fuad Zarbiyev, 'Judicial Activism in International Law - A Conceptual Framework for Analysis', *Journal of International Dispute Settlement* 3, no. 2 (2012): 271.

¹¹¹⁹ Ian Hacking, *The Social Construction of What?* (Cambridge, Massachusetts: Harvard University Press, 1999), 34. For a discussion in IR, see Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations', *European Journal of International Relations* 6, no. 2 (2000): 149. The separation between scholars (observer) and their object of studies (observed) is, of course, one of the main tenets of philosophical positivism. For a post-positivist discussion on 'scholars as agents' in different settings (as teachers, advisors but also as 'guardians' of Western culture and the society of states) in the context of IR, see Vendulka Kubáľková, 'Reconstructing the Discipline: Scholars as Agents', in *International Relations in a Constructed World*, ed. Vendulka Kubáľková, Nicholas Onuf, and Paul Kowert (Armonk: M.E. Sharpe, 1998), 193–201.

In order to make good on these claims, this chapter basically consists of two parts. The next section (2.) reconstructs the role of Lauterpacht in the making of crimes against humanity and the section (3.) that follows turns to Cassese's attempt to make international terrorism an international crime. The latter section will be considerably longer. In order to make the discussion more comprehensive, both sections are embedded in a wider discursive environment. This helps me also to recast and retell (parts of) the history of international criminal law and justice as a history of international crimes, i.e. as a history of the jurisdiction *ratione materiae*. This chapter ends with a conclusion (4.), which addresses the importance and practical relevance of studying the making of international crimes.

2. The Emergence of Modern International Criminal Law. Lauterpacht and Crimes Against Humanity

As it is the case for international law more generally, it is deeply contested where, when and how international criminal law actually originated. The origins of international criminal law are contested as different origins emphasise different aspects of international criminal law.¹¹²⁰ Writing the history of international criminal law is thus never an 'innocent' endeavour. Authors, who are interested in the *logic* of international criminal law, locate the origins usually in discourses about the figure of the *hostis humani generis* (represented by the pirate). Here, some authors go back as far as to Antiquity and the Roman Empire while others limit themselves to the nineteenth century and the role of outlawry of piracy in

¹¹²⁰ Furthermore, as Mikkel Jarle Christensen observes, the mainstream literature on the history of international criminal law is usually told in two ways. Either it is told as a legalistic history, which focuses on the internal developments of the legal discourse and how these developments create practical mechanisms; or it is told from a functionalist standpoint, which emphasises the role of states' interests for the creation of international criminal legal institutions as these institutions are only the epiphenomena of international power struggles, Christensen, 'Academics for International Criminal Justice', 5–6. These two accounts resemble, of course, also the debate between legal positivism in IL (e.g. Oppenheim) and political realism in IR (e.g., Morgenthau). I introduced this debate in Chapter 2; . For an in-depth discussion of different histories of international criminal law, see also Immi Tallgren, 'Searching for the Historical Origins of International Criminal Law', in *Historical Origins of International Criminal Law*, ed. Morten Bergsmo, Yi Ping, and Cheah Wui Ling, vol. 1, 20 (Brussels: Torkel Opsahl Academic EPublisher, 2014), xi – xxix.

British imperial debates.¹¹²¹ Others, who emphasise the gradual *institutionalisation*, locate its origins often in the interwar years.¹¹²² And finally, those voices, who foreground the role of the actual *implementation of trials and tribunals*, locate its origins in the establishment of the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo.¹¹²³

The category of 'crimes against humanity', to which I will turn in this section, originated to a certain extent in all three of these contexts. First, as Gerry Simpson suggests, the "extra-territorial jurisdiction over piracy is an early version of universal jurisdiction over 'crimes against humanity'".¹¹²⁴ This is also the case as in both, the 'crimes against *humanity*' as in the pirate as *hostis humani generis*, 'humanity' (or 'humankind') is considered the referent object, which needs to be protected. Yet – as a side note –, at least in the case of piracy it is at least doubtable whether the extra-territorial jurisdiction was really about protecting *humanity* or whether it was rather about protecting *states* and *empires* against their competitors. Second, the notion of crimes against humanity was used for the first time in a more or less comprehensive way on 28 May 1915, when the French, British and Russian governments strongly condemned the Ottoman Empire's mass killings of Armenians as "*crimes of Turkey against humanity and civilisation*".¹¹²⁵ Interestingly – and again a side note –, the original draft of this message contained the notion of 'crimes against Christianity', which was then changed on French initiative into 'crimes against humanity'. A similar term to crimes against humanity – "offences against the laws of humanity" – was discussed in the context of the Versailles Conference. In this context the idea to install an international criminal

¹¹²¹ For an illuminating discussion see Simpson, *Law, War and Crime*, chap. 7. See also my discussion of piracy and extraterritorial jurisdiction in Chapter 5.

¹¹²² Cf. Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford: Oxford University Press, 2014).

¹¹²³ Cf. Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

¹¹²⁴ Simpson, *Law, War and Crime*, 163.

¹¹²⁵ As cited in Antonio Cassese et al., *Cassese's International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 84 (emphasis by Cassese et al.); see also Lewis, *The Birth of the New Justice*, 64; and the discussion in Norman Geras, *Crimes against Humanity: Birth of a Concept* (Manchester: Manchester University Press, 2011), chap. 1.

tribunal to trial German Emperor Wilhelm II was also on the table.¹¹²⁶ Yet, while the idea to bring the German Emperor to trial found its way into the Treaty of Versailles (Art. 227-230), the notion of ‘crimes against humanity’ did not. In the end, however, Wilhelm II was able to avoid prosecution through his exile in the Netherlands. The attempt to prosecute Wilhelm II is nevertheless often considered to be the starting point of modern international criminal law and the criminalization of war, as it was the first time that a head of state – as an individual – was considered a war criminal. In addition, there was in the immediate aftermath of the Great War the idea to install a permanent international criminal court. But these initiatives soon lost sight through the creation of the PCIJ. If we look, for instance, into the *Lotus* judgment, on which I have already touched upon in the previous chapter, we see that the PCIJ considers issues of (international) criminal law rather to be subject of national territorial jurisdiction than, say, of a universalised international law: as the PCIJ stated, “in all systems of law the principle of the territorial character of criminal law is fundamental”.¹¹²⁷ On the other side, this does not mean that the idea to create a permanent international criminal court as well as the notion of the ‘crimes against humanity’ was completely forgotten during the *Interbellum* as both continued to be part of different initiatives of academics and practitioners.¹¹²⁸ One example in this regard is the creation of the International Association of Penal Law (AIDP) in 1926. Third, in the aftermath of the Second World War crimes against humanity were included into the London Agreement, which established the IMT. I will come back to this later in this section. Yet, it was the decision to include crimes against humanity into the jurisdiction of the IMT, which should make this specific international crime since then one of the crimes that are normally considered to lie at the core of international criminal law.

¹¹²⁶ Cassese et al., *Cassese’s International Criminal Law*, 3rd Ed., 85; see also the statements by British, Canadian and Italian officials, all including the term ‘crimes against humanity’ in Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2002), 65, 74; and the discussion in Lewis, *The Birth of the New Justice*, chap. 3.

¹¹²⁷ According to the PCIJ, this can however change in the future, Permanent Court of International Justice, ‘The Case of the S.S. “Lotus”’, in *Publications of the Permanent Court of Justice: Collection of Judgments*, Series A, No. 10, 1927, 20.

¹¹²⁸ For a proposal to establish an international criminal court, which was supported by academics and practitioners, see Lord Phillimore, ‘An International Criminal Court and the Resolution of the Committee of Jurists’, *British Yearbook of International Law*, no. 3 (1922): 79–86; for a rejection of the idea to establish an international criminal court, see, for example, J.L. Brierly, ‘Do We Need an International Criminal Court?’, *British Yearbook of International Law* 8 (1927): 81–88.

However, it was also the work of one of the leading international legal experts of this period, Hersch Lauterpacht, which should help to make ‘crimes against humanity’ a core concept in the discourse of international criminal law and justice. According to Koskeniemi, who published extensively on Lauterpacht, Lauterpacht was “arguably the last century’s most influential international lawyer”. As such, it would have been, as Koskeniemi considers, “awkward” if Lauterpacht had not contributed to the development of international criminal law.¹¹²⁹ But before I turn to Lauterpacht’s work in the development of international criminal law and here particularly to his role in making crimes against humanity an international crime, let me reconstruct briefly some of Lauterpacht’s more general tenets on international law first. This is also helpful for my discussion of international legal expertise as Lauterpacht repeatedly addressed topics such as the role of the judge in international law or the relationship between academics and practitioners.

2.1 Lauterpacht and International Legal Theory

When I introduced in Chapter 2 various interdisciplinary projects between IR and IL, I pointed out that the (common) history of both disciplines was for a long time characterized by a ‘strange symbiosis’ and ‘hidden’ interdisciplinary dialogue between legal positivism and political realism (starting in the interwar years and ending with the Cold War). While political realists such as Hans Morgenthau (and E. H. Carr) claimed that all international disputes are in the end political, i.e. the

¹¹²⁹ Martti Koskeniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’, *Journal of International Criminal Justice* 2, no. 3 (2004): 810, 813; Koskeniemi’s further contribution on Lauterpacht include, for example, Martti Koskeniemi, ‘Lauterpacht: The Victorian Tradition in International Law’, *European Journal of International Law* 8, no. 2 (1997): 215–63; which was published nearly unchanged as Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), chap. 5; Martti Koskeniemi, ‘Hersch Lauterpacht (1897-1960)’, in *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2004), 601–62; and Martti Koskeniemi, ‘The Function of Law in the International Community: Introduction’, in *The Function of Law in the International Community*, ed. Hersch Lauterpacht (Oxford: Oxford University Press, 2011), xxix – xlvii; which represents a slightly revised version of Martti Koskeniemi, ‘The Function of Law in the International Community: 75 Years after’, *The British Year Book of International Law* 79 (2009): 353–66. For bibliographical details see also Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 2010).

outcome of power politics, legal positivists emphasised on the other hand that there are legal and political disputes with the latter being non-justiciable (Hans Kelsen's neo-positivism notwithstanding).¹¹³⁰ What I did not mention, however, was the fact that there existed, at least during the interwar years and the first decades after the Second World War, a third position, which was also popular to some extent. This was first and foremost Lauterpacht's position. More recently, this position has been characterized as the "most comprehensive treatment [...] to date" of what the English school coined later the 'Grotian tradition' in international thought;¹¹³¹ or it has been described elsewhere as seminal contribution of the neo-natural law tradition in international legal theory (together with, for example, Alfred Verdross' work).¹¹³² This last characterization is interesting as neo-natural refers in these contexts to two important aspects. Firstly, *neo-natural* refers to the fact that Lauterpacht adopted the rigorous scientific method from Kelsen (of whom he was, like Verdross, a student);¹¹³³ but secondly, *neo-natural* also refers to the refutation of main tenets of the European legal positivist tradition of this time – having its foundations in formalism, state-centrism and voluntarism.

¹¹³⁰ For Kelsen, international law was formally complete. This means that Kelsen based the completeness of international law on logical grounds: a complete system of law can be deduced from a *Grundnorm* via logic. Hence, all disputes are justifiable. For an in-depth discussion on Kelsen as international lawyer see Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: Cambridge University Press, 2010), 204–205; and Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013). To be precise, the debate arose also on the question whether the rules of international law should be evaluated with regard to their facticity (realism) or their normativity (positivism). The former would put emphasis on the effectiveness and efficiency of legal norms while the latter on the logical closure of the system of norms (and, then emphasise the counterfactual validity of norms). Morgenthau directly engaged with Kelsen's pure theory of law in his *Habilitationsschrift*, Hans J. Morgenthau, *La Réalité des normes. En particulier des normes du droit international. Fondement d'une théorie des normes* (Paris: Alcan, 1934).

¹¹³¹ Renée Jeffery, 'Hersch Lauterpacht, the Realist Challenge and the "Grotian Tradition" in 20th-Century International Relations', *European Journal of International Relations* 12, no. 2 (2006): 225; see also Lauterpacht's own essay on this tradition, Hersch Lauterpacht, 'The Grotian Tradition of International Law', *British Yearbook of International Law* 23 (1946): 1–53.

¹¹³² For further discussion of the different streams of the natural law tradition in international legal theory, see Geoffrey Gordon, 'Natural Law in International Legal Theory: Linear and Dialectic Presentations', in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 279–305; on Lauterpacht, see, in particular, Gordon, 292–293. Or, as Iain Scobbie puts it: 'A natural law thesis, albeit initially inarticulate, is the thread which runs through and unifies Lauterpacht's work', Iain G.M. Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', *European Journal of International Law* 8, no. 2 (1997): 266.

¹¹³³ Similarly: 'Lauterpacht's theoretical construction of international law is rooted in Kelsenite legal epistemology', Scobbie, 'Theorist as Judge', 265.

Lauterpacht refutes legal positivism (and political realism) basically in three steps. First, Lauterpacht rejects the view that international law is strictly limited by the will of states – something which *Lotus* proclaimed as well as the rule *pacta sunt servanda* (serving in Kelsen’s version of international legal positivism as basic norm) seems to postulate.¹¹³⁴ Instead, Lauterpacht argued in his most important monograph *The Function of Law in the International Community* (published in 1933) that international law’s voluntarism is not *per se* limited to obligation between states as states *could* – Lauterpacht deliberately uses the conjunctive form – also be bound to the *will of the international community* (*voluntas civitatis maximae est servanda*). As Lauterpacht stresses in an often-quoted passage:

“There is no reason why the original hypothesis in international law should not be that the will of the international community must be obeyed [...]. An initial hypothesis expressed in the terms of *voluntas civitatis maximae est servanda* would point, as the source of law, to the will of the international society expressing itself in contractual agreements between its constituent members, in their customs, and in the general principles of law which no civilized community can afford to ignore; it would refer to the *civitas maxima* as meaning that super-State of law which States, through the recognition of the binding force of international law *qua* law, have already recognized as existing over and above national sovereignties”.¹¹³⁵

In Lauterpacht’s later work, this would even further shift as the ‘will of the international community’ as fundamental presupposition and foundation of the international legal order should later be substituted by ‘the social nature of man’ making, finally, the *individual* ‘the ultimate unit of all law’.¹¹³⁶

¹¹³⁴ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011), 427.

¹¹³⁵ Lauterpacht, 429–430 (emphasis in the original).

¹¹³⁶ Scobbie, ‘Theorist as Judge’, 268; and Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (München: Beck, 2001), 167–170. This shift occurred basically in Lauterpacht, ‘The Grotian Tradition of International Law’.

Second, Lauterpacht was also a central figure in the debate regarding the question whether international disputes are political or juridical. This question dominated the discourse in the intersection of international law and politics during the interwar years. I referred to this debate already in Chapter 2, when I reconstructed Morgenthau's early work. In a nutshell, Morgenthau argued that it is impossible to make a distinction between legal and political disputes and that as a consequence for him all disputes are political. Maybe surprisingly, Lauterpacht agreed with Morgenthau that it is impossible to draw a line distinguishing between the legal and political nature of disputes on an international level. However, this led Lauterpacht to a completely different conclusion as Morgenthau as, according to Lauterpacht, "all international disputes are, despite of their gravity, disputes of *legal* character in the sense that, so long as the rule of law is recognized, they are capable of an answer by application of legal rules".¹¹³⁷ Indeed, it was this assumption, namely that all disputes in international relations are in the end of legal nature, that encouraged E.H. Carr to make Lauterpacht the main representative of what Carr believed to be the 'Utopian' tradition in international law (and international thought more generally).¹¹³⁸ Yet, for Lauterpacht himself

¹¹³⁷ Lauterpacht, *The Function of Law in the International Community*, 166 (emphasis added); on differences and similarities between Lauterpacht and Morgenthau, see also Koskeniemi, 'The Function of Law in the International Community: Introduction', xxxvi–xlii.

¹¹³⁸ For example, Carr wrote in a footnote: 'It is a pity that Professor Lauterpacht, having brilliantly conducted his analysis up to the point where the unwillingness of states is recognised as the limiting factor in the justiciability of international disputes, should have been content to leave it there, treating this as "unwillingness", in true utopian fashion, as perverse and undeserving of the intention of an international lawyer', Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (New York: Harper & Row, 1964), 195; on the other hand, Lauterpacht himself attacked Carr in an for Lauterpacht unusually harsh way: first, Lauterpacht criticised Carr's rhetoric of 'utopia' and 'reality' as 'practically everyone who disagrees with Professor Carr is Utopian', Hersch Lauterpacht, 'Professor Carr on International Morality', in *International Law: Being the Collected Papers of Hersch Lauterpacht*, ed. Eliuh Lauterpacht, vol. 2.1 (Cambridge: Cambridge University Press, 1975), 10; second and more important, Carr's realism is according to Lauterpacht not only problematic in rhetorical terms but also in 'empirical' as it presupposes the 'immorality of nations [...] as typical and normal' and as a 'necessary and permanent quality'. Hersch Lauterpacht, 'On Realism, Especially in International Relations', in *International Law: Being the Collected Papers of Hersch Lauterpacht*, ed. Eliuh Lauterpacht, vol. 2.1 (Cambridge: Cambridge University Press, 1975), 60–61; however, realism 'tends to exaggerate the extent of the immoral conduct of States' whereas experience proves the contrary as in reality states do act, as Lauterpacht illustrates through various examples ('a survey of the foreign policy of modern States will show that the immorality of international conduct is something in the nature of a myth'), on moral grounds as even war is only 'an imperfection of international law and of international organization, not of international morality'. In other words, in the end Lauterpacht is able to claim that he is the 'realist', i.e. the one who depicts 'reality' in an accurate way, while Carr's work is based on some mythical presuppositions, Lauterpacht, 'Professor Carr', 72–73. More generally, if there ever was a First Great Debate in IR, it was this exchange between Carr and Lauterpacht's (for more details see Koskeniemi, *The Gentle Civilizer of Nations*, 361); this is interesting because of two reasons. First it was basically a debate between Carr and Lauterpacht or,

the premise of the legal nature of all international disputes had another consequence as it also implied the *completeness* of international law. As Lauterpacht puts it, the “completeness of the rule of law [...] is an *a priori* assumption of every system of law, not a prescription of positive law”.¹¹³⁹

Third and linked to this last point, it is the task of the *international lawyer as judge and arbitrator* – the *judicial function* – to guarantee the completeness of international law. Koskeniemi has summarized Lauterpacht’s position in the following terms:

“Contrary to Kelsen, Lauterpacht does not postulate *formal* but *material* completeness of law, constructed by the lawyer as he proceeds to solve the case. But this construction is neither arbitrary nor based on abstract principles of justice or deviations from the nature of the thing. It is more than an effort to ascertain community consensus or the actual background purpose. For Lauterpacht, legal problem-solution seeks to ensure the unity, consistency and effectiveness of international law as a whole. By using analogy and abstracting principles from individual rules the lawyer will be able to perceive the law as a coherent, meaningful whole which ‘is originally and ultimately not so much a body of legal rules as a body of legal principles’. These principles express the law’s autonomous, systemic ‘coherence’ which ultimately justifies the solution of hard cases”.¹¹⁴⁰

The claim of the completeness of international law signified for Lauterpacht that the legal system has no gaps (*lacunae*) and that an international court cannot declare that there is no applicable law (*non liquet*) and that it has, consequently, no

to be more precise, between Carr’s specific form of ‘realism’ and Lauterpacht’s specific form of ‘international law’. Other prominent voices (in particular, from legal positivism) of this time did not take part. Second, both legal positivism as political realism later criticised Lauterpacht’s position. As a consequence, Lauterpacht’s position should operate as an ‘excluded third’, which should stabilize in the end the ‘hidden’ dialogue between legal positivism and political realism.

¹¹³⁹ Lauterpacht, *The Function of Law in the International Community*, 72.

¹¹⁴⁰ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005), 53 (emphasis in the original); on Lauterpacht and the completeness of the legal system see also Koskeniemi, *The Gentle Civilizer of Nations*, 361–369.

jurisdiction over a specific case.¹¹⁴¹ It is up to the judicial function to fill gaps and to make every case justiciable by recourse to *analogies* from municipal and private law, *general principles* or the *moral purpose* of international law.¹¹⁴² That a judge or arbitrator has to fulfil this function is however on the first view nothing specific to international law as in every legal order abstract norms need to be applied to concrete cases as they cannot specify and anticipate all conditions of their application. As Iain Scobbie notes, norms are for Lauterpacht “relatively indeterminate”.¹¹⁴³ Consequently, in the process of norm application the “judicial activity is essentially the last link in the chain of the crystallization of the rule of law”.¹¹⁴⁴ This process of crystallization through the judicial function is, according to Lauterpacht, based on “normative objectivity”.¹¹⁴⁵ Here, ‘normative objectivity’ derives, in turn, from the competence and impartiality of the international judge. On a second view, the image of the international judges as “‘Herculean’ gap-fillers”¹¹⁴⁶ in combination with the prohibition of *non liquet* has however far reaching consequences as it extends (at least potentially) the jurisdiction of international courts *ad infinitum*. As, for instance, Koskenniemi notes:

“When Hersch Lauterpacht wrote that there are no intrinsic limits to the jurisdiction of international tribunals and suggested that they should routinely pronounce on as many incidental questions as possible, he was undertaking a subtle (‘hegemonic’) manoeuvre to embolden those (judicial) institutions whose biases he shared to declare them as universal preferences”.¹¹⁴⁷

¹¹⁴¹ See also Lauterpacht’s later publication on this topic, Hersch Lauterpacht, ‘Some Observations on the Prohibition of “Non Liquet” and the Completeness of the Legal Order’, in *Symbolae Verzijl: Présentées Au Professeur J.H.W. Verzijl à L’occasion de Son LXXX-Ième Anniversaire*, ed. J.H.W. Verzijl (The Hague: Martinus Nijhoff, 1958), 196–221.

¹¹⁴² That Lauterpacht highlights inter alia the role of analogies from private law is hardly surprising. His PhD thesis was a treatment of private law analogies in international law. In this thesis, Lauterpacht refutes the prevailing positivist view that international law is a ‘form of general jurisprudence’ and argues, instead, that it resembles more private law as both international law and private law are governing the relations between equals, Hersch Lauterpacht, ‘Private Law Analogies in International Law with Special Reference to International Arbitration’ (The London School of Economics and Political Science, 1926), 69.

¹¹⁴³ Scobbie, ‘Theorist as Judge’, 270.

¹¹⁴⁴ Lauterpacht, *The Function of Law in the International Community*, 110.

¹¹⁴⁵ Scobbie, ‘Theorist as Judge’, 265.

¹¹⁴⁶ Koskenniemi, ‘The Function of Law in the International Community: Introduction’, xliii. For a discussion of the similarities between Lauterpacht and Ronald Dworkin’s image of judges, see Koskenniemi, *From Apology to Utopia*, 53–58.

¹¹⁴⁷ Koskenniemi, *From Apology to Utopia*, 609.

In the end, Lauterpacht's approach is also a hegemonic move with regard to the question of how international disputes should be solved – through politics and diplomacy (e.g., Morgenthau) or through law and courts (Lauterpacht) – or, to put it differently, who has the final say and competence when it comes to mobilize expertise in world politics: whether politics trumps law or law trumps politics; whether the international is governed by diplomats or by judges.

2.2 Lauterpacht and International Criminal Law

Lauterpacht himself should become later, from 1955 until his death in 1960, a judge at the International Court of Justice (ICJ) – something, which made him to leave his official academic position as Whewell Chair of International Law at the University of Cambridge.¹¹⁴⁸ However, Lauterpacht started already in the 1930s to obtain – aside of his academic work – positions outside of the scholarly world. In this context, his engagement in the field of international criminal law is a good example of an international legal expert pursuing a project within and outside of academia. Although *themes* of international criminal law have been, as mentioned above, discussed in a more or less loose fashion in the aftermath of the Great War and during the whole interwar period, as an *intellectual and professional field* international criminal law remained, however, still in a very early stage of development. There were simply no international legal experts dedicated solely to the field of international criminal law as the international legal profession was still very generalist. This might be the main reason why Lauterpacht did not publish an entire monograph on the topic of international criminal law. Nevertheless, it is possible to reconstruct his role in the development of the international criminal law in different context. In what follows, I will focus on three of these contexts.

¹¹⁴⁸ On Lauterpacht's role as international judge see Scobbie, 'Theorist as Judge', 279–282.

2.2.1 Lauterpacht editing Oppenheim's International Law

First, Lauterpacht became the editor of *Oppenheim's International Law* in 1935, the same year he was appointed as a Reader at the LSE.¹¹⁴⁹ At this time, *Oppenheim's International Law* was the leading textbook of the discipline.¹¹⁵⁰ Moreover, the textbook was still very much influenced by its original author Lassa Oppenheim, who had died in 1919. In particular, Oppenheim's state-centric positivism and, consequently, voluntarism stand out: international law is exclusively a law between states; it is not complete; and, there is no international law beyond international agreements and a narrowly confined customary international law.¹¹⁵¹ Lauterpacht used his role as an editor to gradually but substantially change the textbook's general orientation. From edition to edition *Oppenheim's International Law* should become more and more Lauterpacht's international law, i.e. what Lauterpacht understood as international law.¹¹⁵² For example, Lauterpacht deleted in the fifth edition, the first one he edited by his own, the concept of the balance of power, which had been a central category for Oppenheim.¹¹⁵³ According to Benedict Kingsbury, this moment had fundamental consequences as "ever since the notion that balance of power principles might be relevant to international law has been virtually unutterable among member of the 'invisible college of international lawyers'".¹¹⁵⁴ Kingsbury's observation mirrors, of course, also my discussion in Chapter 2 and the disciplinary dimensions of the

¹¹⁴⁹ The reconstruction of this first context is strongly influenced by the discussion in Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law', 816–818.

¹¹⁵⁰ The textbook was also widely used in the emerging discipline of IR, see Torbjørn L. Knutsen, *A History of International Relations Theory*, 2nd ed. (Manchester: Manchester University Press, 1997), 302.

¹¹⁵¹ For further contextualisation see also my discussion of Oppenheim in Chapter 2.

¹¹⁵² According to one commentator Lauterpacht's editorship, if not problematic, had at least 'an element of paradox [as] Oppenheim was the last great master of the positivist school [...]; Lauterpacht was among the leading challengers of all the basic assumptions of that school. The result was a compromise satisfactory to no one', C. Wilfred Jenks, 'Hersch Lauterpacht - The Scholar As Prophet', *British Yearbook of International Law* 36 (1960): 66–67.

¹¹⁵³ Hersch Lauterpacht, ed., *Oppenheim's International Law*, 5th ed., vol. I: Peace (London: Longmans, Green and Co., 1937). The previous edition, which was edited by Arnold McNair, still argued, for example, that the "first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations"; or that 'International Law can develop progressively only when international politics, especially intervention, are made on the basis of real State interests. Dynastic wars belong to the past, as do interventions in favour of legitimacy', Arnold D. McNair, *Oppenheim's International Law*, 4th ed., vol. I: Peace (London: Longmans, Green and Co., 1928), 99, 100.

¹¹⁵⁴ Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', *European Journal of International Law* 13, no. 2 (2002): 420.

forty years' rift between IR and IL: as from now on the notion of the balance of power should be associated with IR and it should be excluded from IL's discourse.

If we take a closer look at those themes, which are important for our discussion of international criminal law, three shifts are noteworthy.¹¹⁵⁵ Firstly, Lauterpacht 'inherited' from the previous edition a longer discussion of the question whether for members of the armed forces pleading superior orders could constitute a valid defence against individual responsibility for war crimes. Earlier editions of the textbook as well as the first edition under the auspices of Lauterpacht (i.e. the fifth edition of *Oppenheim's International Law*) were in favour of the position that superior orders could constitute a valid defence and argued, consequently, that only commanders had liability. Lauterpacht changed this position from the sixth edition onwards fundamentally when he claimed that members of the armed forces could not escape liability "if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of *humanity*".¹¹⁵⁶ Secondly, Lauterpacht received from earlier editions also a discussion on war crimes. Earlier editions had introduced the concept of war crimes by distinguishing between war crimes in a moral and a legal sense. This distinction was put forward in order to address situations, which, while formally illegal, were morally understandable. Such situations included in the state-centric framework of the textbook's earlier editions the prohibition of all kinds of participation by civilians in hostilities (e.g., resistance of partisan groups against foreign aggressor). Lauterpacht modified this position in the 1944-edition of *Oppenheim's International Law* as, on the one hand, the distinction between war crimes in a moral and legal sense was deleted and, on the other hand, the position of civilians was strengthened substantially. Finally, the editions published after the Second World War included a longer discussion on the possibility and desirability (both supported by Lauterpacht) of establishing a permanent international criminal court in order to adjudicate international crimes.

¹¹⁵⁵ The discussion of these three points draws mainly on Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law', 816–818.

¹¹⁵⁶ Hersch Lauterpacht, ed., *Oppenheim's International Law*, 6th ed., vol. II: Disputes, War and Neutrality (London: Longmans, Green and Co., 1940), 454–455 (emphasis added).

2.2.2 Lauterpacht's general academic publications on international criminal law

Second, a similar development took place in the course of Lauterpacht's other – more general (i.e. non-textbook related) – academic publications. In his early publications throughout the 1920s Lauterpacht did not deal with topics from international criminal law as, for example, he did neither mention war crimes nor did he address the question of individual criminal responsibility; this changed however since the 1930s when topics related to international criminal law were introduced and quickly occupied a more and more important role in his publications. Lauterpacht was, for instance, invited to deliver the renowned Hague Lecture at the Hague Academy of International Law in 1937. In this lecture, Lauterpacht objects the predominant state-centric image of international law and advocates, instead, the establishment of an “International Criminal Court”, which should help to guarantee the “adoption of international criminal responsibility of the individuals to whom liability for the criminal act can feasibly be traced”.¹¹⁵⁷

A similar argument is brought forward in Lauterpacht's seminal article “The Law of Nations and the Punishment of War Crimes”.¹¹⁵⁸ The article was published in 1944 in the *British Yearbook of International Law* of which Lauterpacht had become the editor in the same year (due to the Second World War, the publication of the Yearbook had been suspended for the previous five years). It is worth to have a closer look at the article as it delivered something like a legitimacy blueprint for the post-Second World War trials in Nuremberg and Tokyo. The article is an important intervention for in particular three reasons.

Firstly, the article provides an at-large discussion of jurisdiction of a potential war crimes trial. Although Lauterpacht addresses different principles of jurisdiction such as the protective or passive nationality principle, he argues that the “ordinary territorial principle of criminal law [...] – the principle that a State is entitled to punish unlawful acts committed within its territory” is sufficient for the

¹¹⁵⁷ As cited in Koskeniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’, 814.

¹¹⁵⁸ Hersch Lauterpacht, ‘The Law of Nations and the Punishment of War Crimes’, *British Yearbook of International Law* 21 (1944): 58–95.

establishment of such a temporal tribunal.¹¹⁵⁹ He does not even mention the possibility to provide such a court with universal jurisdiction. Territorial jurisdiction is sufficient for Lauterpacht as he simply *redefines the territorial scope of states*: Lauterpacht includes crimes committed in or from the air – something which was still disputed at that time and which corresponds, of course, with the notion of territoriality as *dominium* in the Roman law tradition, namely including ‘everything down to hell and up to the heavens’ (*‘usque ad inferos usque ad coelum’*);¹¹⁶⁰ in a similar way, Lauterpacht uses *Lotus* in order to extend the territorial jurisdiction of a country to cover every crime committed by an enemy ship or aircraft on the high seas; moreover, Lauterpacht extends the territorial jurisdiction of a state also to the territories, which had been occupied during a war. This last extension is fundamental as it means that the territorial jurisdiction of a state like Germany during the Second World War (his main example) has also criminal jurisdiction over all territories under German military occupation. As a consequence, every crime committed on these territories falls under the jurisdiction of Germany – regardless of the nationality of the victims and the perpetrators. Hence a criminal court with the territorial jurisdiction over Germany would cover almost all war crimes committed on behalf of Germany (being the perpetrators German nationals or not) during the Second World War against individuals (being them German nationals or not – something that would also attribute rights to stateless persons). The extension of the notion of ‘territory’ of ‘territorial jurisdiction’ was a significant shift in respect to the prevalent opinion, which attributed jurisdiction only over war crimes that had been committed by or against a states’ own nationals or within the territory of a state (and, here, ‘territory’ did not incorporate occupied territories).

Secondly, Lauterpacht discusses the various forms that a tribunal dealing with war crimes could have.¹¹⁶¹ He rejects, on the one hand, the idea of a tribunal established by the defeated state. Such a tribunal would lack impartial judges. Lauterpacht exemplifies this claim by reviewing the German military tribunals, which operated after the First World War. These tribunals were according to

¹¹⁵⁹ Lauterpacht, 62, 63.

¹¹⁶⁰ See my discussion in the previous chapter.

¹¹⁶¹ Lauterpacht, ‘The Law of Nations and the Punishment of War Crimes’, 80–86.

Lauterpacht politically influenced as those who were accused were hardly convicted. On the other hand, he also dismisses the establishment of a permanent international criminal court. In this context, Lauterpacht's main objection is the feasibility (and explicitly not the desirability) of establishing such a court in a short period of time. Lauterpacht expected at the time of publishing the article that the end of World War II was approaching quickly (again, the article was published in 1944) and that the creation of a permanent court would need too much time. Instead, Lauterpacht recommends to rely on the idea of "[q]uasi-international tribunals". These tribunals are "municipal tribunals of the victorious belligerent enlarged by the inclusion of judges from other countries, co-belligerent and neutral".¹¹⁶²

Thirdly, Lauterpacht's article offers a comprehensive discussion of the question of individual criminal responsibility. In this context, Lauterpacht addresses a couple of objections against individual liability, namely the plea of superior orders, the problem of anticipating the uncertainties of the law of war and the role of reprisals. Although Lauterpacht acknowledges in this discussion that these points might be valid to some extent and that there might be certain limitations to individual criminal responsibility, he nevertheless claims that such limitations cannot negate individual criminal responsibility to a larger extent.¹¹⁶³ This is the case, as Lauterpacht considers war crimes as a specific, namely fundamental and severe, class of crimes. They "are crimes against international law", and as a consequence "[w]ar criminals are punished, fundamentally, for breaches of international law".¹¹⁶⁴ This signifies that war criminals are individually responsible for their crimes and cannot escape prosecution by claiming that international law does not apply. As Lauterpacht summarizes:

"The rules of warfare, like any other rules of law, are binding not upon impersonal entities, but upon human beings. The rules of war are binding not upon an abstract notion of Germany, but upon members of the German Government, upon German individuals exercising

¹¹⁶² Lauterpacht, 82–83.

¹¹⁶³ Lauterpacht, 69–80.

¹¹⁶⁴ Lauterpacht, 58, 64.

governmental functions in occupied territory, upon German officers, upon German soldiers”¹¹⁶⁵

It is this passage of Lauterpacht’s article where this line of argumentation – one of the mantras of international criminal law and justice – originated and it has been repeatedly brought forward in the context of international criminal law since then. For example, it resembles Carla del Ponte’s accusation against Milosevic at the ICTY to which I referred at the outset of this chapter; and it has been used almost *verbatim*, as Koskeniemi notes, in the judgment of the IMT:

“That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. [...] Individuals can be punished for violations of international law. Crimes against international law are committed by man, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.¹¹⁶⁶

What is however surprisingly missing in Lauterpacht’s 1944-article is a profound discussion of the nature of international crimes in general and the crimes against humanity in particular. As Koskeniemi puts it, “it seems odd that the article contains no in-depth discussion of ‘crimes against humanity’. That denomination is not even mentioned in the article”.¹¹⁶⁷ It should be, however, the third context where we can see that Lauterpacht engaged in a comprehensive way with international crimes and here particularly with the category of crimes against humanity.

¹¹⁶⁵ Lauterpacht, 64.

¹¹⁶⁶ International Military Tribunal (Nuremberg), ‘Judgment’, *American Journal of International Law* 41, no. 1 (1947): 220–221; and Koskeniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’, 819; see also the discussion in Ainley, ‘Excesses of Responsibility’, 408; Lauterpacht included a similar statement in a draft of the opening speech of Sir Hartley Shawcross, the British Special Prosecutor, at the IMT: ‘The State is not an abstract entity. Its rights and duties are the rights and duties of men. Its actions are the actions of men’, Hersch Lauterpacht, ‘Draft Nuremberg Speeches’, *Cambridge Journal of International and Comparative Law* 1, no. 1 (2012): 62–63. I will come back later in this chapter to Lauterpacht’s role in the drafting of Shawcross’ speeches.

¹¹⁶⁷ Koskeniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’, 820.

2.2.3 Lauterpacht outside of academia

The *third* context is provided by Lauterpacht's role as an international legal expert working in various commissions and committees. For instance, the 1944-article was an academic elaboration of a memorandum, which Lauterpacht had drafted in 1942 for a committee on *Crimes Against International Public Order*.¹¹⁶⁸ This committee was established in the aftermath of a conference at the University of Cambridge in 1941, organised by the *Cambridge Commission on Penal Reconstruction and Development* (which was created in turn by the university's Department of Criminal Science). Lauterpacht, who had been appointed at the University of Cambridge the prestigious Whewell Chair of International Law in 1938, was in this context a member of several sub-committees. These sub-committees were composed by British international legal academics, on the one hand, and representatives from those European countries that have been occupied by Germany, on the other. Although the committee on *Crimes Against International Public Order* "never made any definite recommendation or produced a comprehensive report" it was nevertheless important in collecting information and, first and foremost, for the "creation in official and semi-official circles of an atmosphere favourable to the conception of the punishment of war crimes".¹¹⁶⁹

Moreover, Lauterpacht was requested by the British War Office in 1940 to assist in the updating process of the British *Manual of Military Law*.¹¹⁷⁰ The task of the Manual was (and still is until today) to provide all members of the armed forces with reliable information on the legal limits of warfare. The updated version was finally published in April 1944. In his function Lauterpacht was able to change the previous editions' regulations in particular with regard to the question of superior order. The pre-1944 version stated that

"members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be

¹¹⁶⁸ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Developments of the Crimes of Wars* (London: His Majesty's Stationary Office, 1948), 94–99.

¹¹⁶⁹ United Nations War Crimes Commission, 98–99.

¹¹⁷⁰ Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law', 823.

punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress".¹¹⁷¹

The Manual's statement was explicitly referenced to the fifth edition of *Oppenheim's International Law* (the first under Lauterpacht's editorship). As pointed out above, Lauterpacht changed – step-by-step, i.e. from edition to edition – core positions of the textbook. In the fifth edition, the discussion of superior orders was still in the tone of the previous editions, stating that there was a broad base at least for ordinary soldier to make use of claiming superior orders. This should change however with the sixth edition where the possibility that members of the armed force could claim superior order became substantially limited.¹¹⁷² These changes should also be 'imported' into the Manual and a later report should positively evaluate this shift of the, as it was put, "learned editor, Professor Lauterpacht" and attribute to Lauterpacht the adjustment in the British *Manual of Military Law*.¹¹⁷³ Thus, we can read in the 1944 version when it comes to the question of superior orders the following paragraph:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability

¹¹⁷¹ As cited in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 1 (London: His Majesty's Stationary Office, 1947), 18.

¹¹⁷² See also my discussion earlier in the present chapter.

¹¹⁷³ United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1:18.

if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of *humanity*“.¹¹⁷⁴

It is, in particular, this last sentence of the new regulation, which changed the position of the Manual vis-à-vis superior orders in a significant way as it limits the possibility to plea superior order and, in turn, establishes a new priority guideline: the command of superiors is replaced by the ‘general sentiment of humanity’ as general guideline.

Finally, Lauterpacht was able to make important contributions in the preparation, implementation and realization of the IMT in Nuremberg. For instance, Lauterpacht became in August 1945, on request of the British Foreign Office, a member of the *British War Crimes Executive*, which was charged by the British Government to plan and prepare the prosecution of those who committed war crimes on behalf of Germany. The outcome of the work of the *British War Crimes Executive* – drafted together with similar bodies from the other Allied powers – was the London Charter, which set out the rules and procedures of the IMT. In this process, Lauterpacht worked in close cooperation with both the US chief prosecutor Robert H. Jackson as well as the British counterpart Sir Hartley (later Lord) Shawcross. Lauterpacht had met Jackson for the first time in 1940 and their contact remained informal. In July 1945, it was an “eminent scholar of international law”, which was later identified as Lauterpacht, who suggested to Jackson to include ‘crimes against humanity’ into the London Charter.¹¹⁷⁵ The notion of ‘crimes against humanity’ was hardly known and used in the 1940s and it was Lauterpacht’s influence, which paved its way to be part of the tribunal’s jurisdiction *ratione materiae* (being discussed in Article 6). The other international crimes listed in the Charter were the ‘crimes against peace’, also known as crime of aggression, under Article 6 (a) and war crimes under Article 6(b). Paragraph (c) of Article 6 lists and explains

¹¹⁷⁴ As cited in, United Nations War Crimes Commission, 1:18 (emphasis in the original).

¹¹⁷⁵ As cited in Lauterpacht, *The Life of Hersch Lauterpacht*, 272; see also Jacob Robinson, ‘The International Military Tribunal and the Holocaust: Some Legal Reflections’, *Israel Law Review* 7, no. 1 (1972): 3; Koskenniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’, 811, 821; and Philippe Sands, ‘Twin Peaks: The Hersch Lauterpacht Nuremberg Speeches’, *Cambridge Journal of International and Comparative Law* 1, no. 1 (2012): 37.

*“Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”*¹¹⁷⁶

In August 1945, Lauterpacht explains in a letter to Patrick Dean, who was an legal adviser at the Foreign and Commonwealth Office, the importance of including ‘crimes against humanity’ into the Charter:

“Paragraph (c) of Article 6 of the Agreement—Crimes against humanity—is clearly an innovation. It is a fundamental piece of international legislation affirming that international law is not only the law between States but also the law of mankind and that those who transgress against it cannot shield themselves behind the law of their State or procedural limitations of international law”¹¹⁷⁷

In contrast to the more informal contact to Jackson, Lauterpacht maintained an official position in the office of the British prosecutor Sir Hartley Shawcross. Namely, it was Lauterpacht’s task to prepare the more legal sections of the drafts of the opening and closing speeches at the IMT, which Shawcross delivered in December 1945 and July 1946, respectively.¹¹⁷⁸ While the draft of the opening statements deals mainly with ‘crimes again peace’, the draft of the closing speech engages with all three crimes. With regard to ‘crimes of humanity’, the draft argues that ‘crimes against humanity’ are

¹¹⁷⁶ As cited in Geras, *Crimes against Humanity*, 13–14. As a side note: a minor but important detail was changed during the drafting process of Article 6(c). While the French and English versions of the draft contained a semi-colon after ‘war’, the Russian draft included a comma. The final version followed the Russian draft and included a comma. This detail is important with regard to the temporal jurisdiction (jurisdiction *ratione tempore*) as including a semi-colon would have signified that the Nuremberg Tribunal would have had jurisdiction also over crimes against humanity committed before 1939 as it would not be limited to armed conflicts. See Geras, 14.

¹¹⁷⁷ Lauterpacht, *The Life of Hersch Lauterpacht*, 274; see also Sands, ‘Twin Peaks’, 40.

¹¹⁷⁸ These speeches were recently (2012) published as Lauterpacht, ‘Draft Nuremberg Speeches’; see also the introduction by Sands, ‘Twin Peaks’.

“acts which the general principle of law, of criminal law—and not merely morality and decency—stigmatize as crimes. They are acts which the courts in any civilized country would treat as criminal but for the fact that they have been ordered by the State or by persons acting on behalf of the State”.¹¹⁷⁹

At least two things are interesting in these remarks. Firstly, they help to draw a line between civilized and non-civilized nations, with Germany being part of the latter. As such, “the German Nazi State is not considered by the civilized world to have been a State under the rule of law”.¹¹⁸⁰ This observation is closely connected to the second point, which is the introduction of an idiom strongly shaped by natural legal thinking. That is to say that Lauterpacht draws mainly on the source of *general principles of international law* and as such “*the principle that with regard to the fundamental rights of man there exists a higher forum than the positive law of any single State*”.¹¹⁸¹ Here, Lauterpacht uses the example of murder and “of physical and spiritual persecution”, which are crimes regardless of whether they are forbidden or not by a certain state. This holds true for Lauterpacht as the ultimate subject of international law is the individual human being and not the state:

“But at the same time international law claims that there is a limit to the omnipotence of the State, and the *individual human being*, the ultimate unit of all law, is entitled to the protection of the society of nations when the State tramples upon his rights in a manner which shocks and outrages the conscience of the *mankind*. That principle was expressed more than three hundred years ago by Grotius the founder of modern international law who described as just a war undertaken for the

¹¹⁷⁹ Lauterpacht, ‘Draft Nuremberg Speeches’, 95; similarly, Lauterpacht, 105.

¹¹⁸⁰ Lauterpacht, ‘Draft Nuremberg Speeches’, 96.

¹¹⁸¹ Lauterpacht, 96 (emphasis added).

purpose of defending the subject of a foreign State from injuries inflicted by their ruler”.¹¹⁸²

Such a principle, though it might have been “occasionally dormant”, was only (re)affirmed by including ‘crimes against humanity’ into the London Charter and, as it was only (re)affirmed, does not present a case of retroactive international law (i.e. collide with the principle of *nulla poena sine legem*) – according to the draft, there was only a lack of enforcement of this general principle.¹¹⁸³ Consequently, and this might resemble many discussion of the new interventionism after the end of the Cold War, states are enforced to intervene, when these interventions are “humanitarian intervention[s]”.¹¹⁸⁴ Lauterpacht’s main hope for the international law of the future lies, however, not in intervening states but in the emerging United Nations.¹¹⁸⁵

The history of the further development of international criminal law after the post-Second World War trials and until the end of the Cold War is quickly told: The UN General Assembly asked the International Law Commission (ILC) in 1948 “to study the desirability and Possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international convention”.¹¹⁸⁶ The ILC was divided upon the question whether such a permanent international criminal court would be, first of all, desirable and, second, in light of world political transformations of the beginning Cold War even possible. As a result, the majority of its delegates preferred to wait for a draft statute. In order to produce such a draft statute, the General Assembly assigned at its fifth session a Special Committee, which was composed by representatives of seventeen states, to draft such a statute.¹¹⁸⁷ The Special Committee concluded its task in 1951, but had to modify it in 1953 – especially by softening its compulsory jurisdiction. At this point

¹¹⁸² Lauterpacht, 96 (emphasis added); . As pointed out above, Lauterpacht should re-introduce Grotius in the same year (1946) in one of his most important articles, see Lauterpacht, ‘The Grotian Tradition of International Law’.

¹¹⁸³ Lauterpacht, ‘Draft Nuremberg Speeches’, 97.

¹¹⁸⁴ Lauterpacht, 96.

¹¹⁸⁵ Lauterpacht, 63, 96.

¹¹⁸⁶ United Nations General Assembly, ‘Study by the International Law Commission of the Question of an International Criminal Tribunal’, A/RES/3/260 B (1948).

¹¹⁸⁷ United Nations General Assembly, ‘International Criminal Jurisdiction’, A/RES/489(V) (1950).

of time, it was already foreseeable that the project had no chance to be realised as the major powers opposed it – the United Nations was already in paralysis due to the Cold War. Finally, in 1954 the draft was discarded - the official justification was the lack of definition of the crime of aggression – and the whole project faded out.¹¹⁸⁸

3. The Revival of International Criminal Law, Cassese and International Terrorism

New efforts – and these efforts should be successful in the end – to establish an international criminal court and to make international criminal law a core topic of the international legal and political discourse should only reappear after the end of the Cold War. It was in 1989 when Trinidad and Tobago initiated on behalf of other Caribbean and Central American countries a resolution in the General Assembly to assign the ILC to produce a draft statute for an international criminal court.¹¹⁸⁹ The background of this initiative was the presumption that such a court should help to address international criminal liability to individuals and entities involved in illicit, large-scale transnational narcotic drug traffic – something that caused a serious problem in the region at that time. Yet, these regionally and issue-specific limited efforts should gain momentum and develop into a completely other direction because of larger world political transformations. On the one hand, internal armed conflicts in the Former Yugoslavia and in Ruanda caused mass atrocities among the civilian population. These developments attracted worldwide attention. On the other hand, the fall of the Soviet Union and the rise of the United States as the only remaining superpower ended the Cold War-paralysis of the UN Security Council.

These developments created an atmosphere, which made the establishment of international criminal trials and tribunals not only desirable but also possible. In

¹¹⁸⁸ This does not mean that discussions within the United Nations but also within academic circles stopped at all. However, these discussions remained largely unrecognized by a larger public. For a reconstruction of the history of the crime of aggression as well as its legal and political context, see Marieke de Hoon, 'The Law and Politics of the Crime of Aggression' (Vrije Universiteit Amsterdam, 2015).

¹¹⁸⁹ United Nations General Assembly, 'International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Criminal Activities', A/RES/44/39 (1989).

1993 the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by resolution 827 of the UN Security Council and one year later the International Criminal Tribunal for Rwanda (ICTR) was established by resolution 955 of the UN Security Council.¹¹⁹⁰ Simultaneously, the ILC's work on a draft statute for an international criminal court was overshadowed and formed by all these developments and, in 1994, the ILC presented its draft statute.¹¹⁹¹ The draft statute designed a permanent international criminal court, which should be complementary with national jurisdictions and which should "exercise jurisdiction only over the most serious crimes of concern for the international community as a whole" (preamble). Consequently, only 'core international crimes' such as genocide, aggression, serious violations of the law and custom applicable in armed conflict, and crimes against humanity were included (art. 20) whereas drug trafficking – the original motive to commission a draft statute for an international criminal court – was excluded;¹¹⁹² furthermore, in the draft statute the jurisdiction was limited to states, which have custody of a suspect of a crime, or the territory of a state where a crime occurred (art. 21); several opt-in mechanisms were included (art. 22); and the court was intended to be dependent from the UN Security Council (art. 23).¹¹⁹³ In general, the draft statute was, as one observer considered, a rather "conservative model".¹¹⁹⁴

Although this claim might be exaggerated (as there was for the first time a complete draft statute for a permanent international criminal court and as in this draft statute jurisdiction over core international crimes was included), there were nevertheless a couple of substantial shifts between the ILC draft statute, which was favoured by the Permanent Members of the UN Security Council, and the Rome Statute establishing in 1998 finally the ICC. These shifts made the latter more 'progressive'. According to authors, who emphasise the role of the 'global civil

¹¹⁹⁰ United Nations Security Council, 'Tribunal (Former Yugoslavia)', S/RES/827 (1993); United Nations Security Council, 'Establishment of an International Tribunal and Adoption of the Statute of the Tribunal', S/RES/955 (1994).

¹¹⁹¹ International Law Commission, 'Draft Statute for an International Criminal Court', UN Doc. A/49/10 (1994).

¹¹⁹² For a discussion of excluded ('missing') crimes, see Robinson, 'The Missing Crimes'.

¹¹⁹³ International Law Commission, Draft Statute for an International Criminal Court.

¹¹⁹⁴ Nicole Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case', *International Organization* 63, no. 1 (2009): 38.

society'¹¹⁹⁵ and other norm entrepreneurs, these shifts were facilitated by a coalition of small and medium powers (so-called 'like-minded') together with the help of non-state actors such as Amnesty International, Human Rights Watch or the International Commission of Jurists.¹¹⁹⁶ In a number of regional conferences, organised far away from the UN headquarters in New York, these non-state actors were able to provide valuable legal expertise to still undecided countries from the 'Global South'.¹¹⁹⁷ Nicole Deitelhoff described these settings as 'islands of persuasions', where not power politics but persuasion was at work – something that Jürgen Habermas could have had in mind (according to Deitelhoff) when he introduced the idea of discursive ethics.¹¹⁹⁸ In the end, the members of this coalition were in favour of a more comprehensive jurisdiction. For instance, this was reflected at the Rome Conference in a German initiative, which proposed an international criminal court with universal jurisdiction. The proposal enjoyed strong support by small and medium powers.¹¹⁹⁹ On the other side, particularly the United States were still much in favour of a limited jurisdiction of such a court and a strong position of the UN Security Council (i.e. as designed in the ILC draft statute). Finally, the Rome Statute was a compromise between both positions. The Rome Statute relies, as pointed out at the outset of Chapter 5, on a complex system of complementary jurisdiction while it is independent from the UN Security Council.¹²⁰⁰ Since the establishment of the ICC in 1998, international criminal law further expanded as a couple of so-called hybrid courts operating with regard to Cambodia, East Timor, Kosovo, Bosnia, Sierra Leone and the Lebanon were created. The proliferation of international criminal courts and tribunals produced

¹¹⁹⁵ For a discussion of the limits of the concept of 'global civil society', see, for example, Hans-Martin Jaeger, "Global Civil Society" and the Political Depoliticization of Global Governance', *International Political Sociology* 1, no. 3 (2007): 257–77; and Jens Bartelson, 'Is There a Global Society?', *International Political Sociology* 3, no. 1 (2009): 112–15.

¹¹⁹⁶ Cf. Nicole Deitelhoff, *Überzeugung in der Politik: Grundzüge einer Diskurstheorie internationalen Regierens* (Frankfurt am Main: Suhrkamp, 2006); Deitelhoff, 'The Discursive Process of Legalization'; Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Abingdon: Routledge, 2006); and Marlies Glasius, 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court', in *Global Civil Society*, ed. Marlies Glasius and Mary Kaldor (Oxford: Oxford University Press, 2002), 137–68.

¹¹⁹⁷ Glasius, 'Expertise in the Cause of Justice'.

¹¹⁹⁸ Deitelhoff, 'The Discursive Process of Legalization'. For discussions about the 'use' of Habermas in IR see the various contributions in Peter Niesen and Benjamin Herborth, eds., *Anarchie der Kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (Frankfurt am Main: Suhrkamp, 2007).

¹¹⁹⁹ Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', *American Journal of International Law* 93, no. 1 (1999): 8.

¹²⁰⁰ International Criminal Court (ICC), Rome Statute of the International Criminal Court.

also a demand for international criminal legal experts – working now in the centre and periphery of these institutions.

In the remainder of this chapter, I will focus on one of these international legal experts: the Italian jurist Antonio Cassese. Although Cassese was never employed at the ICC he is nevertheless considered one of the leading figures of the recent expansion of the field of international criminal law. In this context, Cassese permanently oscillated between different roles as an international (criminal) legal expert: Cassese was, e.g., professor of international law at the University of Florence and the EUI in Florence; (co-)edited various journals (*inter alia*, as founding editor of the *Journal of International Criminal Justice*); wrote market leading textbooks both on international law as, specifically, on international criminal law; was the author of a number of seminal articles and important books; was a member of various Italian delegations in the context of the United Nations; became the President of the Council of Europe Committee for the Prevention of Torture (1989-93); chaired various international commissions; became Judge (1993-2000) and first President (1993-1997) of the ICTY and, until shortly before his death in October 2011, as well Judge and first President of the Special Tribunal for Lebanon (STL).¹²⁰¹ In short, as the publisher of Cassese's textbook *International Criminal Law* puts it at the back cover of the second edition:

"This market leading textbook is written by an expert in the field of international criminal law. The author uses his broad academic expertise and judicial experience to provide a unique personal approach to the subject, with thought-provoking analysis that also brings the political and human context to life"¹²⁰²

In his function as a leading expert of international criminal law, one of Cassese's most recent and most discussed projects was the attempt to make international terrorism an international crime.

¹²⁰¹ For a longer biographical sketch, see Salvatore Zappala, 'Personal Remarks on Antonio Cassese and His Vision of International Law and International Criminal Justice along the Road He Walked', *Leiden Journal of International Law* 25, no. 2 (2012): 503–10.

¹²⁰² Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008).

3.1 Cassese and International Legal Theory

As it was the case with Lauterpacht, it is useful, however, to start this section with a reconstruction of Cassese's general take on international law and to proceed then to his effort to make international terrorism an international crime. What is important to note here, is that the context of Cassese's writings is not only with regard to the status of world politics but also when it comes to the structure of the international legal argument a different one as Lauterpacht's. While throughout Lauterpacht's career international law was rather *one* generalist project, Cassese witnessed the increasing differentiation and compartmentalisation of the international legal discourse with humanity's law – and, here, Cassese contributed to *various* projects of humanitarian international law, international human rights law and international criminal law – being only one among these projects.¹²⁰³ This means, e.g., that Lauterpacht rather deduced his own position in the emerging field of international criminal law from his general writings on international law – something which is mirrored in the fact that he never dedicated an entire monograph to international criminal law –, while Cassese worked the other way around as he developed his position on general international law from the specific problematiques, which he faced in international criminal law – both as academic and as practitioner. Furthermore, Lauterpacht is, as pointed out above, usually described as a moderate natural lawyer (with a training in positivism) while Cassese attempted to stay within the confines of legal positivism and to push the boundaries of this prevailing strand of international legal theory. Recently Cassese's approach was thus coined as “presentational positivism”¹²⁰⁴, “ideational positivism”¹²⁰⁵, “utopian positivism”¹²⁰⁶ or (*inter alia* by himself) as “critical positivism”.¹²⁰⁷ In the end however both Lauterpacht and Cassese have also much

¹²⁰³ Cf. Martti Koskeniemi, 'International Lawyers', 2007.

¹²⁰⁴ Robert Cryer, 'International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon', *Journal of International Criminal Justice* 10, no. 5 (2012): 1048.

¹²⁰⁵ Anne Peters, 'Realizing Utopia as a Scholarly Endeavour', *European Journal of International Law* 24, no. 2 (2013): 534.

¹²⁰⁶ Antonio Cassese, ed., *The Human Dimension of International Law: Selected Papers* (Oxford: Oxford University Press, 2008), vi.

¹²⁰⁷ Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Oxford: Hart, 2011), 258–260; Antonio Cassese, 'Introduction', in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford:

in common as on a general level their effort was to make *humanity* the ultimate referent object of international law – with Cassese being described as the “Gentle Humanizer of Humanitarian Law”¹²⁰⁸ – and, on a more technical level, both emphasised the relevance of international courts and, here in particular, foregrounded the *role of judges*.¹²⁰⁹

3.1.1 On ‘critical positivism’

Yet, what does it mean when Cassese’s approach is described as ‘critical’, ‘presentational’, ‘ideational’ or ‘utopian positivism’? *On the one hand*, it means for Cassese to stay within the confines of legal positivism and to recognise the traditional limits of international law. To stay within the confines of legal positivism means, firstly, that one should start any assessment of law with the existing law, i.e. interpret existing legal rules and base proposals for new legal constructs on existing law.¹²¹⁰ Yet, Cassese’s positivism is *critical* as it claims that the “investigation of legal rules and institutions must not be carried out without a proper contextualisation, both socio-politically and ideologically”.¹²¹¹ A proper contextualisation of legal rules might show the “positivist lawyer” that there is “some leeway” in interpretations whenever confronted with “penumbral situations” (the term is H.L.A. Hart’s) – something that occurs frequently in international law.¹²¹² Whenever this occurs, critical positivists could reinterpret the law with recourse to general principles or a progressive interpretation of

Oxford University Press, 2012), xvii; and Feichtner, ‘Realizing Utopia through the Practice of International Law’, 1143.

¹²⁰⁸ Tamás Hoffmann, ‘The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts’, in *Future Perspectives of International Criminal Justice*, ed. Carsten Stahn and Larissa Van Den Herik (The Hague: TMC Asser, 2010), 58–80.

¹²⁰⁹ For a short discussion of similarities between Cassese and Lauterpacht, see Cryer, ‘International Criminal Tribunals and the Sources of International Law’, 1061.

¹²¹⁰ Cassese, *Five Masters of International Law*, 255.

¹²¹¹ Cassese, 258.

¹²¹² Cassese, 258–259; H.L.A. Hart distinguishes between a ‘core’ and a ‘penumbra’ of the meaning of a word. Hart’s example is a legal rule, which forbids taking one’s ‘vehicle’ to the park. While this clearly forbids taking an automobile into the park (core meaning constituting the ‘standard case’), it is not so clear whether it also bans other vehicles such as skateboards or bicycles from the park. The latter are part of ‘a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out’, see H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’, *Harvard Law Review* 71, no. 4 (1958): 607.

customary international law.¹²¹³ As we will see below, Cassese himself should make use at various occasions of interpreting customary international law ‘progressively’. To stay within the confines of legal positivism means, secondly, that one must recognise the traditional limits of international law. As such, Cassese describes international law in a Kelsian fashion as a “primitive legal system”, which is still in its “embryonic stage”.¹²¹⁴ This is due to the fact that states are still “the principal actors on the international scenery”¹²¹⁵ and, hence, international law’s “primary subjects”.¹²¹⁶ In this setting, “individuals play a limited role [...] The latter are as puny Davids confronted by overpowering Goliaths holding instrumental power”.¹²¹⁷ Or, to put it in a different way, states are the “backbone” of international community.¹²¹⁸ As one of the consequences of this setting the international legal order is (still) a primitive legal system as it is horizontal and decentralised when it comes to both adjudication and enforcement. States enjoy large freedom (voluntarism). The main sources of international law are consequently treaties and custom.¹²¹⁹ This means also that all legal rules are rules of pairs of states and as such an emerging *jus cogens* exists only as it binds all states through binaries (*erga omnes*).¹²²⁰ As international law is quasi-determined by the will of states, only changes in the ‘reality’ of the international community¹²²¹ might in turn facilitate transformations of international law. In the end, all this makes international law a “realistic legal system”.¹²²² But, because of the lack of an overarching constitutional order on the international level, Cassese describes – by drawing explicitly on the English School in IR – the current status of the

¹²¹³ Cf. Cassese, *Five Masters of International Law*, 259.

¹²¹⁴ Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 6; for Kelsen’s original account, see, for example, Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures 1940-41* (Cambridge: Harvard University Press, 1942), chap. 2.

¹²¹⁵ Cassese, *International Law*, 3.

¹²¹⁶ Cassese, 4.

¹²¹⁷ Cassese, 4; see also Antonio Cassese, ‘Gathering Up the Main Threads’, in *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 648–652.

¹²¹⁸ Cassese, *International Law*, 71; for an in-depth presentation of Cassese’s view of history (*Geschichtsbild*) and the role, rise and (possible) decline of the state, see Antonio Cassese, ‘States: Rise and Decline of the Primary Subject of the International Community’, in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 49–70.

¹²¹⁹ To rely mostly on treaties and custom is, of course, typical for legal positivism.

¹²²⁰ Cf. Cassese, *International Law*, 14–15.

¹²²¹ It seems that Cassese uses the terms ‘international community’, ‘world community’ and ‘world society’ interchangeable.

¹²²² Cassese, *International Law*, 12.

international community not as Kantian but rather as Grotian.¹²²³ Finally, Cassese is convinced – as recent statements from major powers such as China or the United States indicate – that for a long time “states will remain the masters of world society”.¹²²⁴ Hence, international lawyers have to deal on a general level with the reality of a state-governed international order.

But, *on the other hand*, Cassese’s take on positivism is also the project of what the late Cassese dubbed “realizing utopia”.¹²²⁵ At the core of this project stands the idea that it is possible to bridge the divides between reality and utopia, between stability and change as well as between concreteness and normativity. It is this “oxymoron” of a “realistic utopia”, which Cassese specifies as follows:

“we know that the international society will never be free from violence, poverty, and injustice. We do not dream of a peaceful international society based on comity, friendship, and cooperation. We simply intend to suggest in utopian terms new avenues for improving the major deficiencies of the current society of states”.¹²²⁶

For Cassese there is reasonable hope that such an ‘improvement’ is possible. He bases this hope on some (still modest) changes in the structure of the international legal order transforming the “traditional” international law into a “modern” one:¹²²⁷ here, the emergence of new actors on the international stage (and their continuous, yet slow, incorporation as ‘official’ subjects of international law), such as international organisation, liberation movements and, most importantly, individuals¹²²⁸ as well as the growing relevance of ‘humanizing’ strands of

¹²²³ Cassese, 21; for the original account of the English School, see Martin Wight, *International Theory: The Three Traditions*, ed. Gabriele Wight and Brian Porter (Leicester: Leicester University Press, 1991); and Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd ed. (New York: Columbia University Press, 2002).

¹²²⁴ Cassese, ‘Gathering Up the Main Threads’, 646.

¹²²⁵ Antonio Cassese, ed., *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012).

¹²²⁶ Cassese, ‘Introduction’, xxi.

¹²²⁷ Cassese makes repeated use of the dichotomy of ‘traditional’ vs. ‘modern’, ‘new’ vs. ‘old’, see, e.g., Cassese, *International Law*, 142–144.

¹²²⁸ Cassese, chap. 7.

international law such as humanitarian international law, human rights law and international criminal law stand out for him.¹²²⁹

What becomes also visible in this regard is that, for Cassese, international law is an instrument to tame politics and to make world society a better place – in other words, Cassese operates with a strong opposition between law and politics (the latter also being directly equated with diplomacy).¹²³⁰ In this context, the international legal expert becomes the agent of change, or as Cassese puts it, there is a need for “*judicious reformers*”.¹²³¹ Hence, as Isabel Feichtner has recently observed, the “project of *Realizing Utopia* attests to the strong belief of international lawyers in the possibility of engaging in social engineering through law”.¹²³² According to Cassese, international legal experts can become ‘legal engineers’ or ‘judicial reformers’ in various roles: as scholars, they should help “both to *identify*, for the benefit of politicians and diplomats, areas of international law more in need of radical change, and to *suggest* new ways and modalities to bring international legal institutions and rules up to date”;¹²³³ as legal advisers in foreign ministries they should ensure that politicians and diplomats do not breach international law as well as they should help to expand the rule of law;¹²³⁴ and, most importantly, as judges they should find avenues (where possible) to reshape international law in order to make it less state-centric. To do so, Cassese suggests that judges should make bold use of customary international law – even if faced with the danger of using it *too* bold. It was in the context of the *Tadić* decision of the ICTY, where Cassese made use of this approach, which should later also be coined as the ‘Cassese approach’. Cassese himself should later describe the danger

¹²²⁹ Cassese, chap. 20, 21; cf. Cassese, ‘Gathering Up the Main Threads’, 653.

¹²³⁰ See already Antonio Cassese, ‘The Role of Legal Advisers in Ensuring That Foreign Policy Conforms to International Legal Standards’, *Michigan Journal of International Law* 14, no. 1 (1992): 139–70.

¹²³¹ Cassese, ‘Introduction’, xvii (emphasis in the original).

¹²³² Feichtner, ‘Realizing Utopia through the Practice of International Law’, 1156; this resembles, of course, Morgenthau’s description of the ‘scientific man’, see Hans J. Morgenthau, *Scientific Man vs. Power Politics* (London: Latimer House Limited, 1947). See also my discussion of Morgenthau in Chapter 2.

¹²³³ Cassese, ‘Introduction’, xx (emphasis in the original); see also the discussion in Peters, ‘Realizing Utopia as a Scholarly Endeavour’.

¹²³⁴ As Cassese argued in 1992: ‘At present, greater respect for international law is badly needed to ensure the smoother conduct of international relations. One of the best ways to promote respect for international law lies to a large extent in enhancing the importance of LAs [Legal Advisers] in foreign ministries. If States were to gradually rethink the role of LAs, improve the methods of their appointment, upgrade their functions, and ensure their independence, the stage could be set for expanding the rule of law in international relations’, Cassese, ‘The Role of Legal Advisers’, 170.

of this approach in the following terms

“I was told there was also this fear of the ‘Cassese approach’, namely judges overdoing it, becoming dangerous by, say, producing judgments that can be innovative. For example, at the ICTY, we said for the first time that war crimes could also be committed in internal armed conflicts. This was breaking new ground. *You go beyond the black letter of the law because you look at the spirit of law*”.¹²³⁵

3.1.2 Cassese the Judge I: *Tadić*

In order to better understand what Cassese means by the ‘Cassese approach’ it is worthwhile to have a quick look at the *Tadić* decision of the ICTY.¹²³⁶ The decision of the Appeals Chamber of the ICTY in *Tadić* was not only the first opportunity of the tribunal to lay down its interpretation of international criminal law but it was also the first opportunity of an international tribunal to do so at all since the post-Second World War trials and tribunals. The decision was announced on 2 October 2005 and Cassese was the Presiding Judge of the Chamber. He drafted the judgement by himself.¹²³⁷ As observers have pointed out, the judgement reflects basically Cassese’s own convictions – Cassese’s successor as President of the ICTY, Theodor Meron, even called the judgement (and he meant it in an appreciative and positive way) “Cassese’s *Tadić*”.¹²³⁸ As *Tadić* was the first decision of the ICTY, the main task of the Appeals Chamber was to decide whether the ICTY actually has, as an *international* tribunal established by the UN Security Council, jurisdiction over international crimes that were committed during the Yugoslav Wars. Prior to the judgement, for most observers and international legal experts the core question

¹²³⁵ Cassese, Verrijn Stuart, and Simons, ‘The Judge: Interview with Antonio Cassese’, 52–53 (emphasis added).

¹²³⁶ International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, ‘Prosecutor v Tadić, Decision on the Defence Interlocutory Appeal on Jurisdiction’, IT-94-1-AR72 (1995).

¹²³⁷ Cf. Jean-Marie Aerts, ‘Civil War, Custom and Cassese’, *Journal of International Criminal Justice* 10, no. 5 (2012): 1100; and Hoffmann, ‘The Gentle Humanizer of Humanitarian Law’.

¹²³⁸ Theodor Meron, ‘Cassese’s Tadić and the Law of Non-International Armed Conflicts’, in *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Lal Chand Vohrah et al. (The Hague: Kluwer Law International, 2003), 533–38; see also Hoffmann, ‘The Gentle Humanizer of Humanitarian Law’, 64; and Cryer, ‘International Criminal Tribunals and the Sources of International Law’, 1049–1050; and Henckaerts, ‘Civil War, Custom and Cassese’, 1100.

was thus whether the Yugoslav Wars constitute an international or a non-international conflict. The simplest and less contested strategy for the Appeals Chamber would have been to declare the conflict an international conflict with the consequence that the international crimes committed during the Yugoslav Wars fall under the jurisdiction of the ICTY. The Appeals Chamber, however, opted for another avenue: it stated, that although the Yugoslav Wars were a non-international armed conflict, the ICTY still has jurisdiction over it. In particular, the Appeals Chamber argued that customary law is applicable to non-international conflicts, too: “it cannot be denied that customary rules have developed to govern internal strife”.¹²³⁹

In order to substantiate this point, the Appeals Chamber distinguishes between traditional and modern international law. The judgement describes the traditional approach as follows:

“Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy

¹²³⁹ Prosecutor v Tadić, Decision on the Defence Interlocutory Appeal on Jurisdiction, para. 127, see in general, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, para. 96–127.

*was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands".*¹²⁴⁰

Yet, the Appeals Chamber observes that a new approach – a modern international law – emerges which is based on ‘crystalizing’ customary rules:

“Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. [...] *A State-sovereignty-oriented approach have [sic] been gradually supplanted by a human-being-oriented approach.* Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the *protection of human beings*, it is only natural that the aforementioned dichotomy should gradually lose its weight”.¹²⁴¹

This line of argumentation also resembles Cassese’s earlier academic work and, here, in particular Cassese’s seminal article on ‘The Spanish Civil War and the

¹²⁴⁰ Prosecutor v Tadić, Decision on the Defence Interlocutory Appeal on Jurisdiction, para. 96 (emphasis added).

¹²⁴¹ International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, para. 97 (emphasis added).

Development of Customary Law Concerning Internal Armed Conflicts', which was originally published in 1975.¹²⁴² Cassese argued in this article that during "the Spanish Civil War (1936-1939) a general conviction took shape among States that some fundamental principles and rules of the laws of war would have to be extended to cover civil strifes as well".¹²⁴³ Cassese substantiated this claim of a crystalizing customary law with reference to state practice.¹²⁴⁴ The Appeals Chamber in *Tadić*, however, took a slightly different turn, as it based in its interlocutory decision custom not merely on state practice but on *opinio juris*. With regard to state practice and *opinio juris* the chamber asserts:

"When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions".¹²⁴⁵

It was this rather technical legal operation, i.e. to foreground *opinio juris* over state practice, which made it possible for Cassese and the ICTY to pursue the project to 'humanize' international law in *Tadić* – to speak of '*hominum causa omne jus*

¹²⁴² The paper was reprinted as Antonio Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Armed Conflicts', in *The Human Dimension of International Law: Selected Papers*, ed. Antonio Cassese (Oxford: Oxford University Press, 2008), 128-47.

¹²⁴³ Cassese, 128.

¹²⁴⁴ See also the discussion in Henckaerts, 'Civil War, Custom and Cassese', 1096-1099.

¹²⁴⁵ Prosecutor v Tadić, Decision on the Defence Interlocutory Appeal on Jurisdiction, para. 99.

constitutum est'.¹²⁴⁶ By relying on *opinio juris* it is not the actual behaviour of states but rather the claims (in treaties and declarations) of states on how states should behave, which becomes the basis to determine custom – and in this regard states might become 'rhetorically entrapped'.¹²⁴⁷ Later, Cassese should justify this operation in his scholarly work as well as in the *Kupreškić* decision of ICTY with reference to the 'Martens Clause'. According to Cassese the 'Martens Clause' makes international humanitarian law a special case within international law as the clause postulates to leave the strict confines of inter-state law in international humanitarian law and apply instead the 'laws of humanity'.¹²⁴⁸ Nevertheless, to

¹²⁴⁶ para. 97; see also the later discussion in Antonio Cassese, 'Soliloqui', in *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings*, ed. Heikelina Verriijn Stuart and Marlise Simons (Amsterdam: Amsterdam University Press, 2009), 154.

¹²⁴⁷ Cf. Cryer, 'International Criminal Tribunals and the Sources of International Law', 1049–1050; on the notion of 'rhetorical entrapment' see, e.g., Deitelhoff, 'The Discursive Process of Legalization'; and Thomas Risse, "'Let's Argue!': Communicative Action in World Politics', *International Organization* 54, no. 1 (2000): 1–39. To foreground *opinio juris* over state practice is a very 'modern' approach to customary international law. More traditional approaches rather emphasise the other element of custom, namely state practice. Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', *American Journal of International Law* 95, no. 4 (2001): 758; in general, the problem with *opinio juris* is that it is difficult to determine, as it refers to the belief of states in legal obligations (while state practice refers to the general and consistent practice by states). In order to determine *opinio juris* Anthony D'Amato suggests to refer to statements (declarations and treaties) of states. This approach is followed by Cassese. See Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971); yet, as Koskeniemi notes, both elements – the material element of state practice and the psychological element of *opinio juris* – are always linked together and produce indeterminate rules as it is another expression of the play of normativity (utopia) and concreteness (apology). Koskeniemi describes this in the following words: 'The function of the psychological element is to guarantee that custom does not conflict with the liberal theory of legislation. It counts for the law's 'internal aspects' which distinguishes it from simple coercion. The material element aims to ensure that law-ascertainment can be undertaken without having to rely on what States subjectively accept at any moment. Neither element can be dismissed or preferred to the other without this engendering immediately the objection that custom is either apologist (because it makes no distinction between might and right) or utopian (because we cannot demonstrate its norms in a tangible fashion). Because both elements seek to delimit each other's distorting impact, the theory of custom needs to hold them independent from each other. But this it cannot do. Attempting to identify the presence of the psychological element, it draws inferences (presumptions) on the basis of material practice. To ascertain which acts of material practice are relevant for custom-formation, it makes reference to the psychological element (i.e. 'Those acts count which express *opinio juris*'). The psychological element is defined by the material and vice-versa. This circularity prevents doctrine from developing a determinate method of custom-ascertainment. It is led to determining custom in terms of an equity which it can itself only regard as arbitrary', Koskeniemi, *From Apology to Utopia*, 410–411; similarly, David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987), 80–99.

¹²⁴⁸ The Martens Clause was established in the context of the 1899 Hague Convention. The clause originally states: 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience'. For the scholarly context see Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', *European Journal of International Law* 11, no. 1 (2000): 187–216; and Cassese, *International Law*, 160–161; for the

interpret customary international law in this way was a rather 'bold' move – some would say 'too bold' as it could be interpreted as a shift of the 'secondary rules' of law.¹²⁴⁹

3.2 Terrorism, Custom, Cassese

In line with the effort to 'realize utopia' stands also one of Cassese's most important recent projects, namely the attempt to make international terrorism an international crime. As we will see in the remainder of this chapter, Cassese's strategy in this context strongly resembles the one of 'humanizing' international law, which I just outlined by introducing *Tadić*. In order to reconstruct Cassese's attempt to make international terrorism an international crime, I will concentrate on three interrelating areas of engagement: first, his general scholarly writings on this topics; second, modifications between the different editions of his textbook on international criminal law (which runs now in its third edition); third, his work as president and judge at the Special Tribunal for Lebanon (STL).

Before I start to reconstruct these three contexts, however, one final remark is necessary, namely the question of why it is so important for Cassese at all to make international terrorism an international crime. Cassese justifies this by arguing that international terrorism has recently become one of the major threats for peace and stability both on a national as well as on the international level. Cassese argued, for example, in an autobiographical sketch, which was published in 2009, that 11 September 2001 marked the beginning of a new era and since then terrorism has become *the* formative and prevailing phenomenon in contemporary world community.¹²⁵⁰ International terrorism has become

context of the ICTY see International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, 'Kupreškić et Al., Judgement', IT-95-16-T (2000), para. 525. Cassese was presiding judge of the Trial Chamber. For further discussion see Hoffmann, 'The Gentle Humanizer of Humanitarian Law', 76; and Mary Fan, 'Custom, General Principles and the Great Architect Cassese', *Journal of International Criminal Justice* 10, no. 5 (2012): 1071–1075.

¹²⁴⁹ The concept of 'secondary rules' goes of course back to: H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994).

¹²⁵⁰ Cassese recounts the evolution of world community in three stages, which he witnessed throughout his lifetime: the Cold War (1950-1989) with its foregrounding of state sovereignty and ideological struggles; the post-Cold War decade with the achievements of international criminal justice and human rights on a global scale (1990-2000); and, the age of terrorism (2001-present), Cassese, 'Soliloqui', 157–160.

paramount as “terrorism and its philosophy have become the major divide in the world community”.¹²⁵¹ According to Cassese the world is split today into two camps as, on the one side, stand those states and non-state organizations, which are supportive of terrorism, and, on the other side, those eagerly fighting it. Additionally, terrorism has further deepened the divide between internal and international conflicts, something of which Cassese was aware of since 1990s (as we have seen in *Tadić*), and as such contemporary “mixed conflicts are becoming more and more frequent and, even more dramatically, more asymmetrical”.¹²⁵²

3.2.1 Cassese’s general academic publications on terrorism I: The 1980s

It is noteworthy at this point that Cassese did not start to engage with the phenomenon of international terrorism only after September 2001. Cassese’s first engagement with this topic dates back to the early 1980s. As there are several similarities but also differences between Cassese’s earlier and later work on terrorism, it is important and useful to have a close look first at these early writings on terrorism.¹²⁵³ The belief that terrorism constitutes a serious threat to the international community was already present in the 1980s. As, for example, Cassese speaks of the “heinous and despicable phenomenon of terrorism”¹²⁵⁴ or that “terrorism is haunting” the international community.¹²⁵⁵ Cassese argues that terrorism is, on the one hand, problematic as it is often “*tainted with racism*” – terrorism for the sake of ‘national liberation’ is often more about nationalism than actually liberation – and, on the other hand, as it “has a negative impact on the international community because it subverts the ‘rules of the game’ accepted by all sovereign states”.¹²⁵⁶ It subverts the ‘rules of the game’ as it brings non-state actors – terrorist organisations – to international law, which previously has been

¹²⁵¹ Cassese, 159.

¹²⁵² Cassese, 159.

¹²⁵³ These are merely Antonio Cassese, ‘Terrorism and Human Rights’, *American University Law Review* 31, no. 4 (1982): 945–58; Antonio Cassese, *Terrorism, Politics, and Law: The Achille Lauro Affair* (Cambridge: Polity, 1989); and Antonio Cassese, ‘The International Community’s “Legal” Response to Terrorism’, *International and Comparative Law Quarterly* 38, no. 3 (1989): 589–608.

¹²⁵⁴ Cassese, ‘Terrorism and Human Rights’, 945.

¹²⁵⁵ Cassese, *Terrorism, Politics, and Law*, 1.

¹²⁵⁶ Cassese, 139, 140 (emphasis in the original).

only a law between states (i.e., *inter-state* law);¹²⁵⁷ but it subverts also the ‘rules of the game’ – and this is for Cassese the more relevant point – as it leads some states to commit serious breaches of international law when they respond to terrorism.¹²⁵⁸

To be precise, Cassese was during the 1980s mainly interested in the legal responses of states and the international community towards terrorism. To scrutinize these responses is for Cassese relevant as there is no comprehensive international treaty regulating international responses to terrorism and as such it is unclear where to locate terrorism within different legal systems – i.e., whether terrorism is rather located in municipal and/or international law or whether in human rights law or international humanitarian law. What is sure, however, is that international criminal law did not play a role for Cassese – as for international lawyers in general – during the 1980s. Indeed, Cassese did not even mention this body of law of which he should become later one of the most influential representatives.

On a general level, Cassese identifies two types of legal responses by the international community to terrorism: peaceful and coercive responses. Mechanisms for *peaceful responses* to terrorism are usually codified: multilateral treaties cover specific types of terrorist acts such as the hijacking of aircrafts and ships, taking hostages or attacks against diplomats and heads of governments; international humanitarian law guarantees the protection of civilians from terrorism not only in interstate wars but also in wars of national liberation, civil wars or other forms of ‘internal’ wars; and bilateral treaties regulate and co-ordinate issues related to extradition and co-operation between judiciaries (particularly, following the principle of *aut judicare aut dedere*).¹²⁵⁹ These bilateral

¹²⁵⁷ Cassese claims: ‘International law is no longer a tool handled exclusively by governments; it can also be used by individuals by private organizations and by certain categories of people’, Cassese, viii; furthermore, terrorism blurs the distinction between belligerents and civilians and terrorist attacks violate in their form the internationally agreed principle of chivalry, Cassese, ‘Terrorism and Human Rights’, 948.

¹²⁵⁸ In particular, Cassese’s 1989 monograph stands out here. The monograph offers an excellent overview of the incident. See, in particular, Cassese, *Terrorism, Politics, and Law*, chap. 3; see also Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 601–603; Interestingly, this distinguishes also the pirate from the terrorist as the legal responses to piracy were conducted in accordance to international law, Cassese, *Terrorism, Politics, and Law*, 140.

¹²⁵⁹ Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 591–592.

treaties are, furthermore, often embedded within regulations of human rights law dealing, e.g., with the question whether terrorists should benefit from basic human rights or whether terrorism should be used as trigger and ‘opportunity’ to curtail human rights (for example, by declaring a ‘state of emergency’).¹²⁶⁰

Yet, for Cassese peaceful responses have one basic flaw, as they are like all law based on treaties only binding to those states, which have ratified the respective treaty.¹²⁶¹ Furthermore, even a ratified treaty might not end ‘political’ debates as the ratification might only be the starting point for debates over the ‘correct’ interpretation of a treaty: even if two states sign an extradition treaty, in which they guarantee to extradite terrorists, this treaty might be of limited use if they stick later to divergent notions of terrorism.¹²⁶²

In contrast to peaceful responses, the second category of responses – coercive (or military) ones – is not regulated by treaties. Cassese further specifies this observation, as “rules governing coercive responses are part of the law on the use of armed force. For the most part this is *customary international law* (even though, of course, its roots may lie in treaties, particularly the UN Charter)”.¹²⁶³ Here, we are confronted with the general problem of customary law: its *ambiguity*. For instance, it is difficult, even after the *Nicaragua* decision of the ICJ,¹²⁶⁴ to formulate a clear legal threshold to identify the support and backing of terrorist groups by states: is a lack of prosecution already an act of support of a terrorist group? are financial and logistical assistance enough? what is about attacks on the high seas or the international airspace? Rules in these contexts, Cassese summarizes, are “far from clear and States still have plenty of room for manoeuvre” as it was the case, for example, in the *Achille Lauro* affair in 1985.¹²⁶⁵ This legal ‘grey zone’, in turn, makes responses to terrorism “weak and

¹²⁶⁰ Cf. Cassese, ‘Terrorism and Human Rights’, 950–958.

¹²⁶¹ Cassese, *Terrorism, Politics, and Law*, 9.

¹²⁶² Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 592–593.

¹²⁶³ Cassese, 591 (emphasis added).

¹²⁶⁴ International Court of Justice, ‘Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Merits)’ (1986). Cassese refers, in particular, to the dissenting opinions by Judges Schwebel and Jennings.

¹²⁶⁵ Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 600; on the *Achille Lauro* affair see Cassese, *Terrorism, Politics, and Law*. Chapter 3 provides an excellent overview of the ‘facts’ of the incident.

ambiguous”.¹²⁶⁶

Yet, the most important insights of the discussion of the different categories of responses to terrorism are for Cassese other ones. First, it is the insight that terrorism is, on a general level, actually regulated by international law. As Cassese puts it: “We have reached a situation where there is a general consensus among the international community that terrorism is to be condemned”.¹²⁶⁷ This is the case as peaceful responses are regulated through treaty law and coercive responses through customary law.¹²⁶⁸ Second, Cassese claims that “we appear to be moving closer towards a consensus on a *definition* of terrorism”.¹²⁶⁹ As we will see below both claims, i.e. that terrorism is regulated by international law and that there exists a definition of terrorism, should become recurrent patterns in Cassese’s work on terrorism after September 2001. Finally, Cassese assumes that the common legal responses serve only on a short-term (in the case of coercive responses) and a medium-term (in the case of peaceful responses) basis. In order to provide a long-term solution to terrorism, it is important to eliminate the root causes of terrorism and to stick to extra-legal responses. Cassese draws in this context in particular on Johan Galtung’s work and the distinction between ‘positive’ and ‘negative’ peace – and, here, on the assumption that only ‘positive’ peace can overcome the ‘structural violence’ (by, e.g., fighting social, economic and political inequalities), which generates after all the phenomenon of international terrorism.¹²⁷⁰

¹²⁶⁶ Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 600.

¹²⁶⁷ Cassese, 605.

¹²⁶⁸ Although Cassese reflects with regard to treaty law merely on state practice (*usus*) there are occasional (implicit) references to *opinio juris*. For example: ‘All states and organizations agree on the condemnation of the heinous and despicable phenomenon of terrorism. Even states that pay only lip service to this condemnation would never admit that they support or condone terrorists’, Cassese, ‘Terrorism and Human Rights’, 945; see also the discussion of the role of the United States in Cassese, *Terrorism, Politics, and Law*, 72.

¹²⁶⁹ Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 605 (emphasis added).

¹²⁷⁰ Cassese, 606–608; for an introduction into Galtung’s framework see Johan Galtung, ‘Violence, Peace, and Peace Research’, *Journal of Peace Research* 6, no. 3 (1969): 167–91.

3.2.2 Cassese's general academic publications on terrorism II: After 9/11

While Cassese did not publish on international terrorism throughout the 1990s – something which might also be due to his involvement in the establishment of the ICTY and to his more general publications on international criminal law and international human rights law –, he took up the thread immediately after the September 2001 attacks again: in this context Cassese was among the first international legal experts publishing on the relevance of the 9/11 terrorist attacks for international law. Similarly to his writings in the 1980s Cassese observes that terrorism has not only societal and political effects but also “shattering consequences for international law” as it “is subverting some important legal categories” and “thereby imposing the need to rethink them”.¹²⁷¹ However, this process of ‘rethinking’ of legal categories does not occur for Cassese in the same legal frameworks and subsequent vocabularies as in the 1980s. While international humanitarian law, even though transformed to some extent during the 1990s (particularly through *Tadić*), remains a dominant body of law for Cassese, human rights law has basically been substituted by *international criminal law*. Furthermore, Cassese seems to be more optimistic vis-à-vis the transformative character of these bodies of law as he was back in the 1980s, when he conceptualised international law as being – almost exclusively – a law of states and between states (i.e., inter-state law). Throughout the early 2000s international humanitarian law and international criminal law are for Cassese *the* two streams of international law, which could facilitate to overcome international law’s state-centric nature.¹²⁷²

With regard to the project of making terrorism an international crime, Cassese focuses on three interrelated issues: the identification of terrorism within international customary law, a definition of international terrorism and the relationship of international terrorism vis-à-vis other international crimes (in

¹²⁷¹ Antonio Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’, *European Journal of International Law* 12, no. 5 (2001): 993; Cassese discusses three major impacts of terrorism on international law: its impact on international criminal law, its impact on the law of self-defence and its impact on general principles of law (particularly, the principle of proportionality). As I will focus in the remainder of the section on the impact of terrorism on international criminal law, see for a discussion of the latter two categories, Cassese, 996–1001.

¹²⁷² This resonates of course with Cassese’s general approach to international law. See my discussion above.

particular, crimes against humanity and war crimes). As we have seen above, some of these issues were already raised in the 1980s. However, after September 2001 Cassese intensifies his discussion and starts to elaborate on them in more detail. As such, Cassese states already in the immediate aftermath of the attacks that terrorism is an international crime under international customary law:

“In my opinion, it may be safely contended that [...] at least trans-national, state-sponsored or state-condoned *terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes*”.¹²⁷³

In order to substantiate this claim, Cassese turns to the drafting process of the Rome Statute, where several states endorsed the inclusion of international terrorism into the material jurisdiction of the court, namely as a sub-category of crimes against humanity. Although there might be in general, as Cassese puts it, a “cautious attitude” to include international terrorism into the catalogue of international crimes – as in the end the failure of the proposal to include international terrorism in the ICC Statute or several decisions by municipal courts show –, Cassese notes that some prominent voices such as UN Secretary-General Kofi Annan, UN High Commissioner for Human Rights Mary Robinson and a number of “[d]istinguished international lawyers” were willing to back the proposal and make international terrorism a sub-category of crimes against humanity – something that would subsequently have changed the scope of the notion of crimes against humanity, too.¹²⁷⁴

In the years that followed, Cassese further intensified the project of making international terrorism an international crime. In this context he elaborates that the main doubt why many international legal experts do not consider international terrorism as an international crime is based on the lack of a general definition of international terrorism within international law. Cassese calls this view the

¹²⁷³ Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories’, 994 (emphasis added).

¹²⁷⁴ Cassese, 994–995.

“prevailing view”.¹²⁷⁵ As Cassese outlines it, this view argues mainly that “since states have never agreed upon a definition of terrorism, it would be impossible to criminalize this phenomenon as such”.¹²⁷⁶ Cassese, however, opposes this view and claims that “one may trace how an accepted definition has gradually evolved in the international community”.¹²⁷⁷ At least, in times of peace, Cassese asserts, such a definition exists in *customary international law*. Cassese acknowledges in this context that

“*treaty rules* laying down a comprehensive definition have not yet been agreed upon. However, over the years, under the strong pressure of public opinion and also in order to come to grips with the spreading of terrorism everywhere, in fact widespread consensus on a generally acceptable definition of terrorism has evolved in the world community so much so that the contention can be made [...] that indeed a *customary rule* on the objective and subjective elements of the crime of international terrorism in times of peace has evolved”.¹²⁷⁸

Invoking similar legal technicalities as previously in *Tadić* with the question of whether international humanitarian law is also applicable in internal armed conflicts (see my discussion above), Cassese claims now that a definition had evolved since the late 1930s.¹²⁷⁹ Cassese develops this position on the basis of two arguments. First, he reconstructs practice (*usus*) in various contexts ranging from UN General Assembly resolutions to regional treaties to national legislation and judiciary. Second, Cassese reverses the burden of proof by noting that there exists an internationally accepted definition of terrorism and that the problem of this definition is a lacking concretization of its *exceptions*. Thus, for Cassese, it is

¹²⁷⁵ Antonio Cassese, ‘Terrorism as an International Crime’, in *Enforcing International Law Norms Against Terrorism*, ed. Andrea Bianchi (Oxford: Hart, 2004), 213.

¹²⁷⁶ Cassese, 213.

¹²⁷⁷ Cassese, 214.

¹²⁷⁸ Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, *Journal of International Criminal Justice* 4, no. 5 (2006): 935.

¹²⁷⁹ While Cassese saw the Spanish Civil War as starting point for the applicability of international humanitarian law in internal armed conflicts (see also my discussion above), he argued that in the case of terrorism it is the Convention for the Prevention and Punishment of Terrorism, which was established in 1937 by the League of Nations, Cassese, ‘Terrorism as an International Crime’, 214; on the history of the Convention for the Prevention and Punishment of Terrorism see also Ondrej Ditrych, ‘International Terrorism’ in the League of Nations and the Contemporary Terrorism *dispositif*, *Critical Studies on Terrorism* 6, no. 2 (2013): 225–40.

precisely not the missing agreement on a definition of terrorism but the missing definitions of its exceptions that might cause problems. Here, Cassese discusses mainly two exceptions: on the one hand the question whether there exists a definition in *times of armed conflict* (and not only during times of peace) and, on the other hand, the question whether ‘freedom fighters’ are terrorists or not.¹²⁸⁰ What is important for Cassese in this context, however, is that the lack of a definition of these exceptions cannot neglect a definition of international terrorism in general. For him, such a line of argumentation is untenable, first, on *logical* grounds – “to say because that because there is no consensus on the exception a general notion has not evolved would be a misconception”; but, second, it is also untenable with regard to *treaty law* – as there actually exist enough regional treaties dealing with terrorism – or *national laws* on terrorism.¹²⁸¹

After refusing the position that there does not exist a general definition of terrorism in international law, Cassese starts to list *elements*, which are necessarily required for the crime of terrorism on a *national* level. He identifies three main elements in this regard: terrorism consists of (i) acts normally criminalized under most national legal systems; these acts must be (ii) intended (must be aimed) to spread terror; and (iii) they must be politically, religiously or otherwise ideologically motivated.¹²⁸² These elements need now to be “*translated* into a rigorous articulation within international law”.¹²⁸³

In order to obtain this *international* dimension, Cassese suggests that these acts must be connected either to an international or an internal armed conflict or they have to be of considerable magnitude or have a trans-national dimension.¹²⁸⁴ In addition, there are three possible ways to translate international terrorism into the framework of international criminal law and justice, which are that international terrorism becomes either a sub-category of war crimes, a sub-category of crimes against humanity or a discrete crime (i.e. an international crime

¹²⁸⁰ Cf. Cassese, ‘Terrorism as an International Crime’, 214; and Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 935.

¹²⁸¹ Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 214–216.

¹²⁸² See Cassese, ‘Terrorism as an International Crime’, 219; and Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 937.

¹²⁸³ Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 937 (emphasis added).

¹²⁸⁴ Cassese, ‘Terrorism as an International Crime’, 220.

by its own). The subsumption of international terrorism under these categories of international crimes depends of “the victim to be protected by international law” in a concrete situation.¹²⁸⁵ As Cassese exposes

“terrorist acts are prohibited as war crimes when directed against civilians and civilian objects; when they fall under the category of crimes against humanity, they are normally banned if they target civilians [...]; finally, when terrorist acts may be classified as international crimes of terrorism, they are prohibited whatever their target is”.¹²⁸⁶

Moreover, it is important whether an act of terrorism is committed in times of peace or during an armed conflict: terrorism can only be a sub-category of war crimes during an armed conflict; it can be subsumed under crimes against humanity both in times of peace as during armed conflict; and, it can be an international crime in times of peace.¹²⁸⁷ What becomes, however, increasingly clear in Cassese’s general academic writings over the time is the attempt to make international terrorism a discrete crime also in times of armed conflicts – and, thus, a discrete crime regardless of peace or armed conflict. Here, Cassese refers, for example, to the historical evolution of genocide, which was according to him first a sub-category of crimes against humanity and only gradually differentiated from its “parental crime”; furthermore, Cassese suggests that the “distinct category of *warlike terrorist acts*” might be created, which would also help to criminalize terrorism in times of armed conflict.¹²⁸⁸

3.2.3 Cassese’s International Criminal Law

If we turn now to the second context, Cassese’s work as author of the seminal textbook on *International Criminal Law*, we can find a similar development. The textbook runs now in its third edition: the first two editions were published in

¹²⁸⁵ Cassese, 220.

¹²⁸⁶ Cassese, 220.

¹²⁸⁷ See Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 938–956.

¹²⁸⁸ Cassese, 956 (emphasis in the original).

2003 and 2008 respectively, while the third edition was released posthumously (as *Cassese's International Criminal Law*) in 2013. In this sub-sections I will concentrate only on the two editions (2003 and 2008), which were published during Cassese's lifetime – yet, I will come back to the third edition towards the end of this chapter, as it presents to some extent a summary of Cassese's project to make international terrorism an international crime.

In both editions – 2003 and 2008 – Cassese takes basically the same line of argumentation as in his general academic writings. Large parts are actually taken *verbatim* from academic articles and book chapters (and *vice versa*).¹²⁸⁹ Cassese argues, again, that under international customary law a “definition of terrorism exists, and the phenomenon also amounts to a customary international law crime”;¹²⁹⁰ while there is, since 1937, a definition of terrorism there might exist disagreement about the definition of its exception(s) – something, which does not affect however a general definition of terrorism;¹²⁹¹ and again, Cassese discusses the relationship of terrorism vis-à-vis other international crimes in times of war and peace: whether international terrorism is a sub-category of war crimes, a sub-category of crimes against humanity or a discrete international crime.¹²⁹² In the 2008 edition, Cassese concludes that “[i]nternational law defines and regulates international terrorism”.¹²⁹³ Furthermore, international terrorism is now – and this is new also with regard to his general academic publications on international terrorism – a discrete crime in both times of peace and armed conflict and might become in an “*aggravated form*” a crime against humanity or war crime.¹²⁹⁴

¹²⁸⁹ The discussion in first edition of his textbook basically resembles: Cassese, ‘Terrorism as an International Crime’; see also Antonio Cassese, *International Criminal Law*, 1st ed. (Oxford: Oxford University Press, 2003), 120–131; while the discussion in the second edition is largely identical with: Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’; see also Cassese, *International Criminal Law*, 2nd Ed., 162–178.

¹²⁹⁰ Cassese, *International Criminal Law*, 1st ed., 120.

¹²⁹¹ Although, Cassese admits that it might produce ambiguous anti-terrorism policies, Cassese, 121–123.

¹²⁹² Cassese, 127–130; and Cassese, *International Criminal Law*, 2nd Ed., 166–177.

¹²⁹³ Cassese, *International Criminal Law*, 2nd ed., 177.

¹²⁹⁴ Cassese, 177. The criteria for subsuming international terrorism under war crimes or crimes against humanity remain the same as in Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’; see also my discussion in the previous sub-section. In this context, Cassese addresses also the question of ‘multiplicity of offences’, i.e. ‘whether a person might be charged for more than one crime, and if so, under what conditions and with what legal consequences’, Cassese, *International Criminal Law*, 2nd ed., 178–183.

Yet, it is also interesting to see how Cassese subsequently foregrounds – in scope and emphasis – international terrorism in discussions of international crimes. Both editions offer an own section with several chapters on international crimes. In the first edition, Cassese devotes individual chapters to three international crimes: war crimes, crimes against humanity and genocide. A fourth chapter discusses “other international crimes” and lists aggression, torture and terrorism.¹²⁹⁵ According to Cassese, these crimes are in contrast to war crimes, crimes against humanity and genocide “normally not regarded as being included in the so-called ‘core crimes’” and, furthermore, “at least at present do not fall under the jurisdiction of any international criminal tribunal or court”.¹²⁹⁶ To make aggression, torture and terrorism international crimes is for Cassese important as this would “significantly contribute, at a juridical level, to rein impunity for these odious crimes” as it would “ensure – more and better than any national court can do – full respect both for the principal of impartiality of courts and for the fundamental rights of the accused”.¹²⁹⁷ In a similar vein to the first edition, the second edition of *International Criminal Law* comprises a whole section on international crimes and, also similarly, this section introduces war crimes, crimes against humanity and genocide in separate chapters. What is different now is the structure of the discussion of (possible) additional international crimes: while torture and aggression are addressed together in one chapter, Cassese devotes to ‘terrorism as an international crime’ a separate chapter.¹²⁹⁸ Cassese added also a few more pages to the discussion of international terrorism so that it attains now the same status as the classic ‘core crimes’, namely war crimes, genocide and crimes against humanity.¹²⁹⁹

¹²⁹⁵ Cassese, *International Criminal Law*, 1st ed., chap. 6.

¹²⁹⁶ Cassese, 110. In the case of aggression, this statement is at least controversial as aggression (as ‘crimes against peace’) was included in the catalogue of crimes of the IMT and IMTFE as it is part of the material jurisdiction of the ICC (although not exercised in 2003 due to the lack of a definition at that time). On the later see International Criminal Court (ICC), Rome Statute of the International Criminal Court, para. 5.

¹²⁹⁷ Cassese, *International Criminal Law*, 1st ed., 111.

¹²⁹⁸ Cassese, *International Criminal Law*, 2nd ed., chap. 8.

¹²⁹⁹ The discussion of international terrorism encompasses in the first edition almost twelve and in the second edition almost seventeen pages. See Cassese, *International Criminal Law*, 1st Ed., 120–131; and Cassese, *International Criminal Law*, 2nd ed., 162–172.

3.2.4 Cassese the Judge II: The Special Tribunal for Lebanon

I will turn now to the third context. In March 2009, Cassese should be appointed again as a Judge and first President of an international tribunal – this time of the Special Tribunal for Lebanon (STL). Cassese obtained both positions until October 2011, shortly before his death. The STL was established in 2007 by UN Security Council Resolution 1757 and officially opened in The Hague on 1 March 2009.¹³⁰⁰ The Tribunal was created in order to prosecute those responsible for the killing of the former Lebanese Premier Minister Rafiq Hariri and 22 others on 14 February 2005 as well as connected attacks.¹³⁰¹ The STL represents a hybrid court as it is, e.g., composed by both Lebanese and international judges; moreover, it is established on the basis of an agreement between the United Nations and the Lebanese Republic; yet, in contrast to other hybrid tribunals such as the ones for Cambodia and Sierra Leone, which both have also jurisdiction over domestic crimes, the STL's material jurisdiction is bound to the "provisions of the Lebanese Criminal Court".¹³⁰² The STL is, furthermore, the first international tribunal to have jurisdiction *ratione materiae* over the crime of terrorism. Put differently, though not being the ICC, the STL brought the prosecution of the crime of terrorism finally to The Hague.

On 16 February 2011, the Appeals Chamber of the STL handed down an 'Interlocutory Decision on the Applicable Law' (*Applicable Law*).¹³⁰³ As it was the case with the *Tadić* decision more than 15 years earlier, Cassese was the Presiding Judge of the Appeals Chamber and the decision clearly bears Cassese's signature.¹³⁰⁴ Similarly to *Tadić*, the *Applicable Law* decision was the first major decision of a newly established tribunal and was hence used as opportunity to

¹³⁰⁰ United Nations Security Council, 'Establishment of the Special Tribunal for Lebanon', S/RES/1757 (2007). On the background of the tribunal see, for example, Samer N. Abboud and Benjamin J. Muller, 'Geopolitics, Insecurity and Neocolonial Exceptionalism: A Critical Appraisal of the UN Special Tribunal for Lebanon', *Security Dialogue* 44, no. 5–6 (2013): 469–474.

¹³⁰¹ The temporal jurisdiction of the STL expands from 1 January 2004 to 12 December 2015.

¹³⁰² Special Tribunal for Lebanon, 'Statute of the Special Tribunal for Lebanon', S/RES/1757 (2007), para. 2.

¹³⁰³ Special Tribunal for Lebanon, 'Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging', STL-11-01/I (2011).

¹³⁰⁴ Although the decision was unanimously taken by the five judges of the Appeals Chamber, 'all the evidence' points to the fact that it was Cassese's work, Cryer, 'International Criminal Tribunals and the Sources of International Law', 1047 (footnote 10).

clear the basis of future judgements. As such, the decision was requested by the pre-trial judge on 17 January 2011 in order to resolve important “questions *ab initio* (from the outset) to ensure that this and any future indictments are confirmed – if they are confirmed on sound and well-founded grounds”¹³⁰⁵ *Applicable Law* was rendered without a concrete case,¹³⁰⁶ guided by 15 questions of the pre-trial judge and accompanied by three *amici curiae* briefs.¹³⁰⁷ The decision has been immediately described as a “landmark ruling”¹³⁰⁸ and “an incredible rich decision – if you will (and appropriately enough bearing in mind Judge Cassese’s involvement), the STL’s *Tadic*”.¹³⁰⁹ The interlocutory decision was ‘rich’ not only due to its length (more than 150 pages) but also due to its comprehensive discussion of the nature of interpretation (and, here, particularly the role of judges) in international law, the status of terrorism under international law and questions regarding joint criminal enterprise (JCE) liability or multiple offenses (and multiple charges). In what follows, I will focus on two aspects of the

¹³⁰⁵ Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, para. 1.

¹³⁰⁶ The absence of a concrete case has important consequences for the whole dynamic of the tribunal. Usually, international criminal trials and tribunals work through the antagonism between defence and prosecution – something that ‘diminishes’ also the role of judges. The absent of a concrete defendant in the Applicable Law decision turned this dynamic around, as it foregrounded the position of judges and pushed prosecution and defence (represented by the Defence Office) to the background. In other words, the setting established a rather atypically powerful position to the judges of the Tribunal. This is also an important difference to the *Tadić* decision. For a similar point see Matthew Gillett and Matthias Schuster, ‘Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism’, *Journal of International Criminal Justice* 9, no. 5 (2011): 991–997.

¹³⁰⁷ The briefs were filed by the Institute for Criminal Law and Justice of the Georg-August Götting University, see Kai Ambos, ‘Amicus Curiae Brief Submitted to the Appeals Chamber of the Special Tribunal for Lebanon on the Question of the Applicable Terrorism Offence with a Particular Focus on “Special” Special Intent And/or a Special Motive as Additional Subjective Requirements’, *Criminal Law Forum* 22, no. 3 (2011): 389–408; the War Crimes Research Office at American University Washington College of Law, Susana Sácouto and Katherine Cleary, ‘Amicus Curiae Brief on the Practice of Cumulative Charging Before International Criminal Bodies Submitted to the Appeals Chamber of the Special Tribunal for Lebanon Pursuant to Rule 131 of the Rules of Procedure and Evidence’, *Criminal Law Forum* 22, no. 3 (2011): 409–32; and by Professor Ben Saul from the Sydney Centre of International Law at the University of Sydney, see Ben Saul, ‘Amicus Curiae Brief on the Notion of Terrorist Acts Submitted to the Appeals Chamber of the Special Tribunal for Lebanon Pursuant to Rule 131 of the Rules of Procedure and Evidence’, *Criminal Law Forum* 22, no. 3 (2011): 365–88. However, only the first two briefs, which supported the STL with additional information on the 15 questions of the pre-trial judge, were taken to account as the third brief, which was particularly critical with Cassese’s earlier argumentation on the international crime of international terrorism, was not taken into account as it arrived the STL one working day too late. For a critique of the way the STL made use of the briefs, see Ben Saul, ‘The Special Tribunal for Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function’, in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham: Ashgate, 2013), 93–94.

¹³⁰⁸ Michael P. Scharf, ‘Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation’, *ASIL Insights* 15, no. 6 (4 March 2011),.

¹³⁰⁹ Marko Milanovic, ‘Special Tribunal for Lebanon Delivers Interlocutory Decision on Applicable Law’, *EJIL Talk* (blog), 16 February 2011.

decision: its remarks on interpretation (and the role of judges) in international law and the discussion on the crime of terrorism.

In a – at least for an international criminal tribunal – rather atypical way, the *Applicable Law* decision addresses at its beginning fundamental methodological questions in a comprehensive fashion. This discussion comes near to a *obiturn dictum*. It addresses, in particular, questions with regard to the nature of custom and the role of judges in the identification of it. These discussions can be understood as the methodological underpinning of what Cassese has termed in his extra-curial writings as ‘critical positivism’.¹³¹⁰ What is interesting here is that the decision concedes a rather powerful position to the judicial function. For instance, the decision states that

“Interpretation is an operation that always proves necessary when applying a legal rule. One must always start with a statute’s language. But that must be read within the statute’s legal and factual context. Indeed, the old maxim *in claris non fit interpretatio* (when a text is clear there is no need for interpretation) is in truth fallacious, as has been rightly emphasised by distinguished scholars”.¹³¹¹

In other words, interpretation is always needed – all adjudication is interpretation – and it is the task of a court to render these interpretations:

“The process is not to construe the text initially to determine whether there is a gap and, if there is, to construe it a second time to deal with the problem created by the gap. Rather, the court performs a simple exercise of construction, referring to whatever is the relevant context”.¹³¹²

At this point, the *Applicable Law* decision differentiates between two sorts of

¹³¹⁰ See my discussion above in this chapter under 3.1.1.

¹³¹¹ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, para. 19 (emphasis in the original). The decision lists as ‘distinguished scholars’ Ronald Dworkin and Pierre-Marie Dupuy.

¹³¹² Special Tribunal for Lebanon, para. 19.

context: internal and external context. The internal context is the linguistic context within a text (e.g., a statute). To speak of an internal context signifies that words should not be treated in isolation within a concrete text but rather in their relation to other words and sentences of the text. The external context, on the other hand, covers everything outside the text, which is important for its interpretation. According to the Appeals Chamber, context “must embrace all legitimate aids to interpretation”, i.e. context must be used as wide as possible – including internal and external context.¹³¹³ Interpretation guarantees that “a statute is presumed to be ‘always speaking’”, i.e. the interpretation of the context helps to adapt a text to changing social realities without changing the original text.¹³¹⁴

It is now the task of judges to find and interpret the context. As the *Applicable Law* decision argues, judges should look for Hartian “penumbra situations” in order to find some room for interpretation.¹³¹⁵ As we have seen above, Cassese had stated this specific argument before in his general academic writings.¹³¹⁶ When such a ‘penumbral situation’ exists,

“it falls to the interpreter as far as practicable to give consistency, homogeneity and due weighting to the different elements of a deriving or heterogeneous set of provisions. Judges are not permitted to resort

¹³¹³ para. 20.

¹³¹⁴ para. 21. Although not quoted in the decision, Luhmann reaches to a similar conclusion: ‘All law, which is set out in written form, is therefore law to interpret. Once this is recognised, it is expected from texts to authorize their interpretation, for instance, by determining who is appointed to interpret and how the interpretation should be carried out. Through this ‘who’ and ‘how’ the law, even in fixed texts, adapts to evolutionary transformations of the society, and this even if legislation is available, which could change texts in their written form. Every currently valid text is submit to interpretation as it is text only in context of interpretation’ (‘Alles schriftlich fixierte Recht ist mithin zu interpretierendes Recht. Sobald man das erkennt, wird den Texten zugemutet, ihre Interpretation zu autorisieren, etwa festzulegen, wer zur Interpretation berufen ist, und wie die Interpretation zu erfolgen hat. Über dieses “wer” und “wie” paßt sich das Recht, auch bei fixierten Texten, evolutionären Veränderungen der Gesellschaft an, und dies selbst dann, wenn Gesetzgebung verfügbar ist, um Texte auch in ihrer Schriftform zu ändern. Jeder aktuell geltende Text setzt sich der Interpretation aus, ja ist Text nur im Kontext von Interpretation’), Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt/Main: Suhrkamp, 1995), 256.

¹³¹⁵ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 23.

¹³¹⁶ Interestingly, the STL decision uses the same edition and, within it, relies on the same pages in order to cite Hart as in Cassese, *Five Masters of International Law*, 258. See also my discussion earlier in this chapter.

to a *non liquet*".¹³¹⁷

This view on the role of interpretation, links of course to Lauterpacht's discussion of the judicial function and that an international court cannot pronounce *non liquet*, i.e. that an international court cannot declare that there is no applicable law and that it has, consequently, no jurisdiction over a specific case.¹³¹⁸ And indeed, the decision quotes Lauterpacht directly in order to clarify the function of the judge:

"[T]he function of the judge to pronounce in each case *quid est juris* [what is the law?] is pre-eminently a practical one. He is neither compelled nor permitted to resign himself to the *ignorabimus* [it shall be ignored] which besets the perennial quest of the philosopher and the investigator in the domain of natural science"¹³¹⁹

However, in contrast to Lauterpacht, who argues in favour – as we have seen above – of analogies from municipal law, general principles or the moral purpose of international law in order to fill 'gaps' in law, the Appeals Chamber in the *Applicable Law* decision – and this is in line with Cassese's earlier work within and outside academia – relies on the source of customary international law. *Applicable Law* acknowledges that in this constellation of a strong role of the judicial function lies always the danger that judges could take a decision, which is perceived as being too bold, i.e. where the interpreter "override[s]" its competency.¹³²⁰ Thus, judges should be cautious in pushing the boundaries of international law.

What does this mean with regard to the STL? According to the *Applicable Law* decision, the context of the tribunal consists first of all of three 'lawmakers',

¹³¹⁷ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 23.

¹³¹⁸ Cf. Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet"'. See also my discussion above in this chapter.

¹³¹⁹ The quotation is from: Lauterpacht, *The Function of Law in the International Community*, 72; it is cited in *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 11; yet, according to Matthew Gillett and Matthias Schuster, this quotation was 'taken out of context'. For more detail see Gillett and Schuster, 'Fast-Track Justice', 997.

¹³²⁰ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 24.

which are the Parliament of Lebanon (“in respect to the substantive criminal law”), the United Nations and the Government of Lebanon (the drafters of the STL’s Statute) and the judges of the tribunal (making “the adjectival rules of procedure and evidence”).¹³²¹ The construction of these three ‘lawmakers’ produces (together with ‘penumbra situations’) some leeway for interpretation as it is unclear where the boundaries between these three bodies is located (in the end, it is the role of the STL to decide this). *Applicable Law* interprets this construction in accordance with the Statute as following: “The starting point is the criminal law of Lebanon”.¹³²² However, the STL is “nonetheless an international tribunal in provenance, composition, and regulation”.¹³²³ As such the STL should use international law, as a context, in order to *interpret* Lebanese criminal law. The tribunal may refer to sources of international law “to assist in interpreting and applying Lebanese law”.¹³²⁴ But, according to the decision, the structure of this context, namely the structure of international law, has changed recently:

“The principle *in dubio mitius* [in case of doubt, the more favourable construction should be chosen] is emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role and there did not yet exist intergovernmental organisations such as the United Nations tasked to safeguard such universal values as peace, human rights, self-determination of peoples and justice. It is indeed no coincidence that, although this canon of interpretation was repeatedly relied upon by the Permanent Court of Justice in its heyday, it is no longer or only scantily invoked by modern international courts. Today the interests of the world community tend to prevail over those of individual states, universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout

¹³²¹ 22.

¹³²² para. 25, see also: ‘[W]e are called upon primarily to apply *national* law - in particular, Lebanon’s - *principialiter* (that is, in the exercise of our primary jurisdiction over particular allegations)’ para. 33; this is in accordance with the Statute of the Special Tribunal for Lebanon, para. 2.

¹³²³ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 16.

¹³²⁴ Special Tribunal for Lebanon, para. 62.

the world community”.¹³²⁵

What is interesting about this dichotomy between an ‘old’ and a ‘new’ international law as well as the analysis of the current status of the international/world community is that it resembles exactly the one in Cassese’s textbook on *International Law* six years earlier.¹³²⁶ I have discussed this earlier in this chapter. While the transformation of the international legal order provided according to the textbook a vantage point in order to introduce a more ‘humanized’ international law, it opens up in the *Applicable Law* decision the discussion whether the crime of terrorism constitutes an international crime under customary international law or not. I will turn now to this second important point of the decision.¹³²⁷

The discussion of a possible crime of terrorism under customary international law covers 40 paragraphs of the decision (paras. 83-123). The first of these paragraphs held the following:

“The Defence Office and the Prosecutor both forcefully assert that there is currently no settled definition of terrorism under customary international law. However, although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, *closer scrutiny demonstrates that in fact such a definition has gradually emerged*”.¹³²⁸

The *Applicable Law* decision – a decision against both the Defence Office and the Prosecutor – substantiates this view by addressing the question of the formation of custom under international law as well as the elements of the crime of terrorism, when it held that

“a number of treaties, UN resolutions, and the legislative and judicial

¹³²⁵ 29 (emphasis in the original).

¹³²⁶ Cf. Cassese, *International Law*, 142–144.

¹³²⁷ Or, the ‘Tribunal’s principal *raison d’être*: the crime of terrorism’, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, para. 42.

¹³²⁸ para. 83 (emphasis added). This statement is certainly also a good example of the particularly weak position of the Defence Office and the Prosecutor in the setting of the decision.

practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged. This customary rule requires the following key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element".¹³²⁹

Put differently, the line of argumentation of both the identification (of the formation) of custom and of the elements of the crime of terrorism resembles the one in Cassese's previous academic publications. For instance, in order to identify custom the decision relies, similarly to Cassese's earlier writings, on several regional treaties, UN General Assembly and Security Council resolutions as well as on national legislation and national judicial decisions. Here, the review of these various sources is extended in depth (mainly by reviewing the legislation and judicial decisions from more countries) but not in substance in comparison to Cassese's earlier work. According to the decision for example the review of various national laws¹³³⁰ reveals that these "laws, despite peripheral variations normally motivated by national exigencies, share a core concept: terrorism is a criminal action that aims at spreading terror or coercing government authorities and is a treat to the stability of society or the State".¹³³¹

In general, the decision concludes with regard to the existence of terrorism

¹³²⁹ para. 85 (emphasis in the original).

¹³³⁰ The review lists, inter alia, countries such as Germany, the Netherlands, France Finland, the United Kingdom, Australia, Canada, Pakistan, Colombia, Peru, Mexico, the United States, the Russian Federation and India. It includes countries from civil and common law traditions as well as countries from an Islamic (shari'ah) law tradition such as Saudi Arabia, para. 93–96.

¹³³¹ para. 97, a similar finding is provided by the review of national court decisions: 'In recent years courts have reached concordant conclusions about the elements of an international crime of terrorism', Special Tribunal for Lebanon, para. 100; for an opposite view, see, for example, Saul, 'The Special Tribunal for Lebanon and Terrorism as an International Crime'.

under customary law that “it can be said that there is a settled practice concerning the punishment of acts of terrorism as commonly defined, at least when committed in time of peace”.¹³³² Yet, the decision identifies custom not only by the action of states (state practice) but holds that “in addition, this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitates*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*)”.¹³³³ That terrorism is commonly punished is, however, not sufficient to determine whether it is also criminalized under international law. Interestingly, the *Applicable Law* decision refers in this context to the *Tadić* Interlocutory Decision by the ICTY Appeals Chamber, which Judge Cassese had presided himself in 1995 (see my discussion above in this chapter under 3.1.2), as ‘seminal decision’. It is worth to quote the entire relevant paragraph (para. 103) in the *Applicable Law* decision:

“The Appeals Chamber acknowledges that the existence of a customary rule outlawing terrorism does not automatically mean that terrorism is a criminal offence under international law. According to the legal parameters suggested by the ICTY Appeals Chamber in the *Tadić* Interlocutory Decision with regard to war crimes, to give rise to individual criminal liability at the international level it is necessary for a violation of the international rule to entail the individual responsibility of the person breaching the rule. The criteria for determining the issue were again suggested by the ICTY in that seminal decision: the intention to criminalize the prohibition must be evidenced by statements of government officials and international organizations, as well as by punishment for such violations by national courts. Perusal of these elements of practice will establish whether States intend to criminalise breaches of the international rule”.¹³³⁴

Here, the *Applicable Law* decision argues that international criminalization of terrorism works analogously to the one of war crimes, namely that “the domestic

¹³³² *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 102.

¹³³³ para. 102.

¹³³⁴ para. 103 (emphasis in the original).

criminalisation of breaches of international humanitarian law led to the international criminalisation of those breaches and the formation of rules of customary international law authorising or even imposing their punishment”.¹³³⁵ In other words, there might exist spill-over effects transferring the criminalisation of a certain crime from the domestic to the international level and making it, thus, an international crime.¹³³⁶ As a result of this, the decision finally states that

“the customary rule in question has a twofold dimension: it addresses itself to international subjects, including rebels and other non-State entities (whenever they exhibit such features as to enjoy international legal personality), by imposing or conferring on them rights and obligations to be fulfilled in the international arena; at the same time, it addresses itself to individuals by imposing on them the strict obligation to refrain from engaging in terrorism, an obligation to which corresponds as correlative the right of any State (or competent international subject) to enforce such obligations at the domestic level”.¹³³⁷

As already noted the decision holds that terrorism is a crime under customary international law in *times of peace*. Now, for the Appeals Chamber the question arises whether international terrorism is also a crime under customary international law in *times of armed conflict*, something that might be denied through the contested question of the status of ‘freedom fighters’ as a possible exception from terrorism.¹³³⁸ We have seen above that Cassese elaborated on these issues extensively in his general academic writings on terrorism as well as in the different editions of his textbook on *International Criminal Law*. We have also seen that Cassese gradually accentuated this project, as international terrorism became from publication to publication more and more a discrete international

¹³³⁵ Special Tribunal for Lebanon, para. 104.

¹³³⁶ This resembles, of course, the line of argumentation in *Prosecutor v Tadić*, Decision on the Defence Interlocutory Appeal on Jurisdiction.

¹³³⁷ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 105.

¹³³⁸ para. 107.

crime.¹³³⁹ The *Applicable Law* decision takes up this position as well. The decision states that “the conclusion is warranted that a customary rule is incipient (*in statu nascendi*) which also covers terrorism in time of armed conflict”.¹³⁴⁰ The decision comes to this conclusion by – again – reviewing state practice through international treaties as well as national legislation and judicial activities.

In the end – and in light of the fact that the STL should primarily apply Lebanese criminal law –, however, the Appeals Chamber arrives to the general conclusion that

“despite the existence of a customary international law definition of the crime of terrorism in time of peace, and its binding force on Lebanon, it cannot be *directly* applied by this Tribunal to the crimes of terrorism perpetrated and falling under our jurisdiction”.¹³⁴¹

3.2.5 Post-Scriptum: Cassese’s International Criminal Law

The whole development of Cassese’s project to make international terrorism an international crime, however, was ‘concluded’ two years later, in 2013, when the most recent edition – the third edition – of Cassese’s textbook on international criminal law was published. As the textbook was published posthumously it was, as it is a tradition in IL, renamed into *Cassese’s International Criminal Law*. Furthermore, it was revised and edited by a group of scholars with the late Cassese being only one of them.¹³⁴² Most of the textbook’s chapters – fourteen out of twenty-one – were revised by Cassese’s co-editors. Yet, among the few chapters that Cassese himself had worked on was the one on terrorism. With regard to the list of crimes the third edition resembles the second one, meaning also that a

¹³³⁹ Compare, e.g., Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories’; with Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’; and Cassese, *International Criminal Law, 2nd Ed.*; see also my reconstruction above in this chapter under 3.2.2 and 3.2.3.

¹³⁴⁰ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 109 (emphasis in the original).

¹³⁴¹ 123 (emphasis in the original).

¹³⁴² Cassese et al., *Cassese’s International Criminal Law, 3rd ed.*

whole chapter (ch. 8) is devoted to terrorism.¹³⁴³

Compared to the previous edition, the chapter remained in length and structure mostly the same. However, Cassese changed one subsection fundamentally. This subsection (8.2) deals with elements, which could point to a generally agreed definition of terrorism in time of peace.¹³⁴⁴ As he had done for a decade, Cassese confirms that there exists an agreed definition of international terrorism in time of peace – the most important condition to criminalize terrorism as a distinct *international* crime. Yet, what is interesting here is that Cassese refers in this subsection of his textbook now extensively to the *Applicable Law* decision by the Appeals Chamber of the STL. Without making it transparent that he has been the presiding judge of this chamber, Cassese uses *Applicable Law* as the only source to determine the existence of terrorism as an international crime in time of peace under customary international law. The textbook quotes, *inter alia*, three paragraphs of the decision as a whole.¹³⁴⁵ Among them paragraph 103 – the one referencing in the *Applicable Law* decision directly the *Tadić* decision of the ICTY. Put differently, the textbook uses Cassese’s work as a judge in order to gain authority and brings finally Cassese’s different projects of ‘realizing utopia’ – the humanization of international humanitarian law and the making of the international crime of international terrorism –, which he pursued within and outside of academia, together.

4. Conclusion: From Guantanamo to The Hague – Or, who judges Humanity?

The purpose of this chapter was to reconstruct the role of international legal experts – understood as ‘people with projects’ – in the making of international crimes, i.e. their boundary work with regard to an important but often neglected aspect of jurisdiction: the jurisdiction *ratione materiae*. In the course of the chapter I focussed on two projects of two of the most important experts in the recent

¹³⁴³ The chapter is now entitled just ‘Terrorism’ (while it was ‘Terrorism as an International Crime in the previous edition). The remaining structure of the section on international crimes stayed the same, listing – together with terrorism – war crimes, crimes against humanity and genocide in separate chapters while torture and aggression share one chapter.

¹³⁴⁴ Cf. Cassese et al., *Cassese’s International Criminal Law*, 3rd ed., 148–149.

¹³⁴⁵ These are paras. 85, 103 and 105 of *Applicable Law*. I have quoted all three paragraphs above in this subsection.

history of international (criminal) law, Hersch Lauterpacht's role in the making of 'crimes against humanity' and, to a larger extent, the recent – and until today basically failed – attempt of Antonio Cassese to make 'international terrorism' an international crime. In order to scrutinize their jurisdictional projects, I did not focus on the 'hidden intentions' of these experts and possible success 'conditions of their projects' but on two (sometimes intertwined) dimensions or levels: on the one hand, I traced back how international legal experts 'change hats', meaning how Lauterpacht and Cassese rotated between their positions in academia, in the government or – as in the case of Cassese – as judges of international courts and tribunals; on the other hand, I reconstructed the different argumentative strategies of these experts, i.e. the rather 'technical' side of law. While both Lauterpacht and Cassese stuck to their argumentative strategies in their different roles, these argumentative strategies (and their consequences) – although pursuing similar projects in the context of humanity's law – differed essentially. While Lauterpacht's moderate neo-natural law approach foregrounded general principles as a source, Cassese emphasised – in line with his theoretical stance of 'critical positivism' – customary international law and, here, particularly the subjective element of *opinio juris* in order to 'realize utopia'. While Lauterpacht started with 'humanity' as core category of international law and pursued, somehow as a consequence, the criminalization of 'crimes against *humanity*' as a project, Cassese's vantage point was a more traditional notion of international law – basically understood as inter-state law –, which made for him the categorisation of international terrorism – as 'disruptor of central legal categories' – as an international crime so significant. To make international terrorism an international crime would, then, for Cassese, create an opportunity to realize a more utopian notion of international law, namely one, which takes individual human beings seriously. Beside these dissimilarities, the projects of Lauterpacht and Cassese had at least two important things in common: on the one hand, these were projects to redraw the boundaries of international law in order to bring 'humanity's law' in and, on the other side, judges were conceptualised as central agents of such change.

Yet, in order to conclude this chapter, let me address shortly a couple of points, which I haven't discussed so far. First, as I said at the outset of this chapter, the aim of this chapter was not to discuss possible success conditions with regard

to the ‘making’ of international crimes, i.e. why for instance Lauterpacht’s project to make crimes against humanity an international crime was more successful than Cassese’s of international terrorism.¹³⁴⁶ In order to speculate, I would follow Koskenniemi’s claim, as discussed in chapter 3, that traditional international legal argumentation permanently oscillates between normativity and concreteness in order to ‘avoid openly political rhetoric’ and that a ‘persuasive legal argument is one that appears both normative *and* concrete’. It is not the ‘speaker’ who determines whether an argument is successful or not but the audience, in the case of international law ‘it is the consensus in the profession—the *invisible college* of international lawyers—that determines, at any moment, whether a particular argument is or is not persuasive’.¹³⁴⁷ What is import to note is that the ‘consensus of the invisible college’ is never fixed but variegates over time. The projects Cassese and Lauterpacht could be considered as prime examples of international lawyers, which try to be both normative and concrete: both combining a firm technical-legal background with the idea to move beyond the confines of a state-centric version of international legal positivism.

Second, what I also haven’t touched upon in this chapter were the various critical remarks, uttered by other scholars and practitioners, regarding the projects of Lauterpacht and Cassese. In particular Cassese’s project to make international terrorism an international crime and, here, his role as judge was considered at least controversial and immediately subject to broader debates. For instance, Roger O’Keefe described the identification of international terrorism under customary international law in the *Applicable Law* decision in the following terms:

“It has been held by the Appeals Chamber of the Special Tribunal for Lebanon that terrorism is a crime under customary international law. The claim is unconvincing, based as it is on an overdetermined reading

¹³⁴⁶ Or, why *Tadić* was more successful than *Applicable Law* (at least, until now).

¹³⁴⁷ Koskenniemi, *From Apology to Utopia*, 68; Martti Koskenniemi, ‘Methodology of International Law’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007),

of the evidence that takes liberties with the requirements for *opinio juris* in the formation of rules of customary international law”¹³⁴⁸

In a similar vein, the decision has been characterised by other commentator as an example of an *obiter dictum* (with regard to its discussion on interpretation and the judicial function)¹³⁴⁹ or a decision going *ultra vires*.¹³⁵⁰ Furthermore, it has been claimed that the decision is “[p]rocedurally flawed” as “it is in many parts more akin to a legal textbook rather than a judicial decision”.¹³⁵¹ This last point, namely to resemble a legal textbook rather than a judicial decision, was mainly provoked by the specific structure of the Appeals Chamber during the *Applicable Law* proceedings, as it constituted – in the lack of a concrete case – more the structure of an advisory opinion than an interlocutory decision (the latter having a contentious background constituted through the play of a strong defence and strong prosecutor as main protagonists).¹³⁵² This links also to a more general observation, namely that international courts and tribunals in their capacity as advisory boards “tend to take a more ‘theoretical’ and abstract, almost academic formulation”.¹³⁵³

Third, this kind of criticism is often linked to the claim of judges ‘overstretching’ the judicial function and practicing what then is called ‘judicial activism’. This was also the case with Cassese’s work as a judge in the context of the STL. As, for example, Marko Milanovic summarizes, the decision “is a manifesto of judge-made law (or, more crudely, *judicial activism*) if ever there was one”.¹³⁵⁴

¹³⁴⁸ O’Keefe, *International Criminal Law*, 160.

¹³⁴⁹ See, for instance, Kai Ambos, ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’, *Leiden Journal of International Law* 24, no. 3 (2011): 656; and Stefan Kirsch and Anna Oehmichen, ‘Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon’, *Durham Law Review Online* 1, no. 1 (2011): 6. For a different position, see Gillett and Schuster, ‘Fast-Track Justice’, 1006–1007. For an in-depth discussion of the figure of *obiter dictum* (in the context of the Barcelona Traction decision - its first and until now most famous invocation), see Christian J. Tams and Antonios Tzanakopoulos, ‘Barcelona Traction at 40: The ICJ as an Agent of Legal Development’, *Leiden Journal of International Law* 23, no. 4 (2010): 781–800.

¹³⁵⁰ Gillett and Schuster, ‘Fast-Track Justice’, 1003.

¹³⁵¹ Gillett and Schuster, 1020.

¹³⁵² Cf. Gillett and Schuster, 991.

¹³⁵³ Zarbiyev, ‘Judicial Activism in International Law’, 272.

¹³⁵⁴ Marko Milanovic, ‘On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese’s Last Book’, *European Journal of International Law* 23, no. 4 (2012): 1041 (emphasis added); Ben Saul goes even further: ‘The Decision is also startling because it is not an instance of the ordinary kind of incremental judicial activism that necessarily tailors the law to novel circumstances. Rather,

Milanovic substantiates this point when he describes how Cassese's argumentative strategy (with regard to the 'technical' of law) and his project of 'realizing utopia' hang together with his work as judge and as academic:

"Cassese's prescriptions for achieving this utopia are of course more interesting – and more contestable – than the utopia itself. A wish list is one thing; realizing it is another. And Cassese's methods of realizing utopia are telling. First, there is the fluidity of the doctrine of sources of international law, resulting in its increased malleability; secondly, activist scholarship coupled with activist judging, which exploits this malleability, for example with regard to the emergence of new custom or *jus cogens*. States cannot be trusted with making a better international law, and a better world; they must be pushed into it, pushed by international courts, domestic courts, other independent or expert institutions, and by the civil society. It is perhaps only a slight exaggeration to say that states are the enemy, the problem that needs fixing".¹³⁵⁵

Fourth, as I said, I will not provide a detailed critique and list of objections against Lauterpacht or Cassese's work – the scope of this chapter was to reconstruct how international legal expertise in the context of jurisdictional projects works and what international legal experts actually do. Yet, the different strands of critique and particularly the claim of 'judicial activism' points to an – also for our purpose – important point, namely the way how the relationship of law and politics is conceptualised. Fuad Zarbiyev, for example, notes that the claim of 'judicial activism' is usually brought up when it is perceived that a judge or tribunal start to do their "own 'business'" and/or trespass the boundaries of a "certain implicit conception of the relationship between judicial and political

it is an example of a judiciary transforming itself into a global legislature, creating entirely new law and exceeding the accepted bounds of the judicial function. In a fit of disguised legislative activism, it invented a new and *post facto* international criminal liability for terrorism, resulting in the radical expansion of liability under Lebanese criminal law as it was understood in 2005', Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', *Leiden Journal of International Law* 24, no. 3 (2011): 678; see also Saul, 'The Special Tribunal for Lebanon and Terrorism as an International Crime', 91.

¹³⁵⁵ Milanovic, 'On Realistic Utopias and Other Oxymorons', 1046.

branches”.¹³⁵⁶ However, the boundary is not fixed and the boundary itself is rather the site of struggles of the ‘adequate’ relationship between law and non-law, between law and politics, between academia and non-academia, and so on. In other words, one man’s judicial activism is another man’s legitimate use of the judicial function (then positively referred to as ‘judicial creativity’).¹³⁵⁷

Fifth, ‘to do one’s own business’ refers in this context also to the sometimes intimate relationship between academia and judiciary in international law. As we have seen in this chapter and as Zarbiyev points out “[i]nternational law scholars display a real complicity with international judges, supplying them the rationalization that glosses over the tensions, arbitrariness, contingencies, and contradictions though legal practice”.¹³⁵⁸ Academics and their interpretations play a particularly important role in international law as this strand of law is usually conceptualised as horizontal. Consequently, what “makes international law peculiar is [...] the fact that, contrary to what happens in domestic laws, those interpretations are not killed by virtue of judicial interpretations”.¹³⁵⁹ This permanent exchange between academia and court-annexed positions is usually taken for granted by the ‘invisible college of international lawyers’: “The game is so taken for granted and its rules so well established and unchallenged that the players do not need to hide it”.¹³⁶⁰ Moreover, the ‘complicity’ between scholars and judges is also taken for granted in international law as law in general works through chains of interpretations, meaning that judges permanently interpret other judges and scholars, *vice versa*. These permanent chains of interpretation help also to make (international) law to appear more ‘technical’ as it helps to ‘hide’

¹³⁵⁶ Zarbiyev, ‘Judicial Activism in International Law’, 250. In other words, this latter claim, i.e. to trespass an implicitly agreed boundary between law and politics, is the first and foremost linked with the accusation of judges and tribunals starting to pursue ‘political projects’ and to ‘politicise the law’. This resembles, of course, the conception of the relationship law and politics, i.e. the idea that both law and politics can be conceptualised as hermetically closed spheres, that was the vantage point for different critical projects within IR and IL, which I have outlined in chapter 3.

¹³⁵⁷ Or as Joseph Powderly puts it, ‘certain rules or boundaries must be respected if judicial creativity is not descend into the realm of judicial activism’. According to Powderly this was, however, the case in the STL decision as it ‘is a prime example of when a bench crosses the line separating good faith creative interpretation from naked judicial activism’, Joseph Powderly, ‘Distinguishing Creativity from Activism: International Criminal Law and the “Legitimacy” of Judicial Development of the Law’, in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham: Ashgate, 2013), 237, 239.

¹³⁵⁸ Zarbiyev, ‘Judicial Activism in International Law’, 271.

¹³⁵⁹ Zarbiyev, 271.

¹³⁶⁰ Zarbiyev, 271.

that it consists of the personal projects of judges, academics and other international legal experts.¹³⁶¹

Sixth, this kind of ‘taken-for-grantedness’ and naturalization does not only obscure the (political) projects involved but also the *performative* effects of the expert work at stake in the context of international courts and tribunals. What do I mean by these performative effects? Simply put, ‘performative’ means that language creates its own reality.¹³⁶² This is the case if we look, for instance, at decisions of international trials and tribunals. As Jean-Marie Henckaerts notes with regard to the *Tadić* interlocutory decision, “regardless of whether Cassese (and his fellow judges) was right or wrong in 1995, the subsequent evolution proved him right”.¹³⁶³ This is the case as the ICTY in later decisions, other *ad hoc* tribunals and legal scholars started to quote and refer to *Tadić* – and making it thus part of international criminal law’s chains of interpretation by hiding its (for some problematic) origins. In other words, after *Tadić* one could legitimately refer to *Tadić* in order to argue in favour of the criminalization of war crimes, which have been committed in non-international armed conflicts.¹³⁶⁴ In a similar vein, a focus on the performativity of the work of international legal experts reveals, e.g., also the self-confirmatory practices of recent *ad hoc* tribunals. As Christine Schwöbel claims that “rather than discussing the ICTY’s *Tadic* case as a foregone conclusion in which the ICTY simply *had* to assume jurisdiction, it is tempting to go down the technical and absolutist route instead. *Tadic* is henceforth [...] a case which determined the jurisdiction of the ICTY through the *principle of jurisdiction*”.¹³⁶⁵ And, as Schwöbel continues, the same holds true for the recent STL decision:

“Most recently, this simple self-confirmation of jurisdiction was repeated at the Special Tribunal for Lebanon (STL): ‘The Trial Chamber

¹³⁶¹ For a strong argument in this regard, see Ronald Dworkin, ‘Law as Interpretation’, *Texas Law Review* 60 (1982): 540–546; see also the important critical remarks by Stanley Fish on Dworkin’s argument, in Fish, *Doing What Comes Naturally*, chap. 4.

¹³⁶² Cf. John L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962).

¹³⁶³ Henckaerts, ‘Civil War, Custom and Cassese’, 1101.

¹³⁶⁴ The same is, of course, true with regard to international crimes. The ‘making’ of the international crime of crimes against humanity was primarily enabled through its inclusion in the London Charter of the IMT. Whether this is also the case with international terrorism after the STL’s *Applicable Law* decision only time will tell.

¹³⁶⁵ Schwöbel, ‘The Comfort of International Criminal Law’, 179.

confirmed the Special Tribunal for Lebanon’s jurisdiction to try those accused of committing the 14 February 2005 attack and connected cases...’ a press release on the website of the STL notes. What good fortune for the chambers, office of the prosecutor and registry that the principle of jurisdiction, implemented by the trial chamber, did not allow for the argument of the Defence to prevail that they had been instituted in their respective roles on the back of a lack of jurisdiction! What was a foregone conclusion and justification has, by a simple use of legal terminology, become a general principle of jurisdiction, to be applied in ICL for future cases”.¹³⁶⁶

Consequently, to speak about jurisdiction is not simply an ‘innocent’ mapping exercise of the law but reveals the performative dimension and productive power of language.

Last but not least, this links also to the question of why we should examine jurisdictional projects in order to understand authority and legitimacy in the current constellation of world society. On the one hand, it points (and links) to the growing interest and body of scholarship on the role, rule, authority and legitimacy of international courts and tribunals.¹³⁶⁷ On the other hand, it connects also to the question of, as Frédéric Mégret put it, “[w]ho do international crimes ‘belong’ to?”.¹³⁶⁸ To frame discussions about international crimes in the vocabulary of ownership and possession helps Mégret to illustrate how global political struggles over international crimes work. “Although crime is obviously something that societies are keen to eliminate”, Mégret explains, “it is also curiously something about which they feel a strong sense of ownership, especially when competing claims for jurisdiction arise. Many of the debates on allocation of cases can and are thus often conceived in the language of property: appropriation, confiscation,

¹³⁶⁶ Schwöbel, 179–180.

¹³⁶⁷ See, for instance, the special issue introduced by Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, ‘How Context Shapes the Authority of International Courts’, *Law and Contemporary Problems* 79, no. 1 (2016): 1–36; or Armin von Bogdandy and Ingo Venzke, *In wessen Namen? Internationale Gerichte in Zeiten globalen Regierens* (Berlin: Suhrkamp, 2014).

¹³⁶⁸ Frederic Megret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’, *Cornell International Law Journal* 38, no. 3 (2005): 739; see also Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013), 16.

transfer (as of a title)".¹³⁶⁹ In light of this chapter, this means that struggles whether crimes against humanity or international terrorism are not only abstract – sometimes highly technical – struggles between different international legal experts and which are fought in academia or in the back rooms of some insignificant courts. This means that we should rather conceive them in line with the different invocations of a politics of humanity as struggles (and its counter-movements). And, as this chapter has shown, this can be a struggle of whether certain crimes – whatever the reasons might be – ‘belong’ to sovereign states or courts and tribunals of ‘humanity’; whether those suspect of international terrorism ‘belong’ to Guantanamo or the docks of The Hague.

¹³⁶⁹ Megret, ‘In Defence of Hybridity’, 739.

Chapter 7: Re-Inventing Interventions: Legitimacy, International Criminal Law and the Politics of Imagination

1. Introduction

The previous chapter reconstructed projects of jurisdiction in one specific field of 'humanity's law', namely in the context of the making of international crimes in the discourse of international criminal law and justice. In particular, it focussed on the projects of two international legal experts – two of the most renowned international lawyers of the last century: Hersch Lauterpacht's successful project to make 'crimes against humanity' an international crime and Antonio Cassese's more recent – till now basically failed – project of making 'international terrorism' an international crime on a larger scale. To focus on international crimes as modes of the politics of jurisdiction goes hand-in-hand with a non-territorial, post-Cartesian, multidimensional and non-exclusive notion of jurisdiction as advanced in Chapter 5 as it point out that jurisdictional projects, particularly projects of humanity's law (with international criminal law as one of its branches), extend by non-territorial logics; in the case of the previous chapter the politics of jurisdictional boundary drawing was situated in the question of whether a crime constitutes an *international* crime (i.e., jurisdiction *ratione materiae*) and therefore belongs to the 'international' – or not. The present chapter further inquires into such a flexible notion of jurisdiction. However, it adds the temporal dimension or the question of temporality to the politics of jurisdiction in the context of an emerging 'humanity's law'.

Moreover, while Chapter 6 was basically situated within the broader field of international criminal law and justice, this chapter reconstructs the politics of jurisdictions mainly in the discourse of interventions for humanitarian purposes (concerning thus mainly questions of international humanitarian law). I say 'mainly' as (and we will see this later in this chapter) international crimes – and also international criminal law – play an important role in the discourse of intervention, in particular, in the context of the responsibility to protect. This

means that both international criminal law and the discourse of intervention are often intersecting, intertwined and overlapping. For example, in the context of the UN Special Tribunal for Lebanon (STL), i.e., the international court that rendered the *Applicable Law* decision under the presidency of Antonio Cassese, scholars like Samer N. Abboud and Benjamin N. Muller it have argued that it constituted a “specific form of intervention” – an “international intervention made permissible by the international criminal tribunal system”.¹³⁷⁰ Moreover, it was emphasised that the “STL successfully sought to intervene in various ways in the domestic affairs of Lebanon” and by doing so “instituting a process beyond Lebanon’s jurisdiction”.¹³⁷¹ In more general terms, several authors have pointed to the link between intervention and international criminal justice; in particular, by emphasising that international criminal courts and tribunals themselves are part and parcel of projects of intervention – some observers have labelled this as ‘judicial interventions’.¹³⁷² As, for instance, Andrea Birdsall notes “[j]udicial interventions have a comparable dynamic to humanitarian intervention; they expose the conflict between order and justice on a concrete level because state sovereignty (international order) is compromised to protect human rights (individual justice)”.¹³⁷³ A slightly different angle is taken by Frédéric Mégret, when he observes that two of the core projects of the international criminal law and of the intervention discourses, namely the “ICC and R2P discourses”, show a “strong mutual complementarity and even dependency”.¹³⁷⁴ As such, both play an important role in the “liberal transformation of world order”¹³⁷⁵ and are main drivers of ‘humanity’s law’.

¹³⁷⁰ Samer N. Abboud and Benjamin J. Muller, ‘Geopolitics, Insecurity and Neocolonial Exceptionalism: A Critical Appraisal of the UN Special Tribunal for Lebanon’, *Security Dialogue* 44, no. 5–6 (2013): 468.

¹³⁷¹ Abboud and Muller, 474.

¹³⁷² Cf. Andrea Birdsall, *The International Politics of Judicial Intervention: Creating a More Just Order* (London: Routledge, 2009); Andrea Birdsall, ‘The Responsibility to Prosecute and the ICC: A Problematic Relationship?’, *Criminal Law Forum* 26, no. 1 (2015): 51–72; and Christian M. De Vos, Sara Kendall, and Carsten Stahn, ‘Introduction’, in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian M. De Vos, Sara Kendall, and Carsten Stahn (Cambridge: Cambridge University Press, 2015), 1–20.

¹³⁷³ Birdsall, *The International Politics of Judicial Intervention*, 3.

¹³⁷⁴ Frédéric Mégret, ‘ICC, R2P, and the International Community’s Evolving Interventionist Toolkit’, *Finch Yearbook of International Law* 21 (2010): 15.

¹³⁷⁵ Christopher Daase, ‘Legalizing Legitimacy: A Critique of the Responsibility to Protect as an Emerging Norm’, *Telos* 170 (2015): 67.

Moreover, like the discourse of international criminal law, the discourse of intervention has a rather long (pre-)history. Recent scholarship – scholarship in the context of the ‘turn to history’ of international thought – has pointed out that practices of intervention have been deeply embedded within European great power politics in the nineteenth century and that these interventions were very often justified by ‘humanitarian’ purposes. Yet, the ‘targets’ of these interventions by European powers were not other European states, but ‘humanitarian’ interventions were rather advanced in what was considered as non-European. ‘Humanitarian’ interventions were thus intertwined with questions of hierarchy and exclusionary practices in the context of the ‘Family of Nations’ by means of ‘standards of civilization’ and ‘civilizing missions’. Main examples are the British interventions in the context of the abolition of slavery and the various interventions by European states in the Ottoman Empire.¹³⁷⁶ Put differently, humanitarian interventions played an important role within colonial and imperial debates. Critics of more recent humanitarian intervention refer therefore often to the (neo-)imperial and (neo-)colonial implications of such practices.¹³⁷⁷

Yet, this chapter, although recognizing (and even foregrounding) the fact that practices of interventions are deeply connected to questions of power and authority, does not pursue the direction of a postcolonial critique. Rather, it is interested in how jurisdictional projects in the context of the intervention discourse developed a future-oriented logic and how this logic also changes the temporal structure, i.e., the temporality, of international legal argumentation. In particular, this chapter reconstructs various *translations* within the intervention discourse and how – step-by-step – the in general past-oriented logic of international law, evaluating whether the NATO intervention in Kosovo in 1999 was legal, turns at the end of a long translation process (or ‘chain of

¹³⁷⁶ For the British case see, for example Edward Keene, ‘A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century’, *International Organization* 61, no. 2 (2007): 311–39. For the various interventions of European states in the Ottoman Empire see, for example Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914: The Emergence of a European Concept and International Practice* (Princeton University Press, 2011). See also, for a general discussion, Nicholas Onuf, ‘Humanitarian Intervention: The Early Years’, *Florida Journal of International Law* 16, no. 4 (2004): 753–87.

¹³⁷⁷ Cf. Abboud and Muller, ‘Geopolitics, Insecurity and Neocolonial Exceptionalism’.

translation'¹³⁷⁸) in the context of the 'implementation' of the responsibility to protect into a future-oriented logic, which is interested in assessing the 'risk' of whether international crimes might happen and thereby creates a justificatory vocabulary for future intervention. By reconstructing this, the chapter points also out that every project in this processes of translation (every chain link) produces new forms of uncertainty and ambiguity, although, paradoxically, the original aim of this project might have been to reduce uncertainty and ambiguity; yet, in the end this new uncertainty and new ambiguity 'help' to pursue new projects. To study this, I focus on two interconnected episodes of the recent discourse of intervention by means of a focussed (re)reading of key documents. Firstly, I reconstruct how the concept of legitimacy was introduced in the context of the NATO intervention in Kosovo in 1999 and how this brought a new level and mode of *semantic uncertainty* to the discourse of intervention. Secondly, I focus on how the concept of the responsibility to protect was introduced in order to reduce uncertainty. However, I argue that we can find new forms of uncertainty – *temporal uncertainty* – in this discourse, when the traditionally past-oriented logic of international legal argumentation is confronted with emerging future-oriented logics. These forms of uncertainty do terminate the general project of interventions for humanitarian purposes but rather create the conditions of possibility for projects of intervention. The upshot of my argument is then that neither more law nor more knowledge (expertise) reduces uncertainty and ambiguity, as more fundamental issues are at stake which are connected to practices of power and international authority and trigger questions such as: Who represents the international? Who represents humanity?

In order to advance my argument, the chapter is structured in the following way. The next section (2.) introduces the interventionist debate in the context of the NATO bombings in Kosovo in 1999. Yet, I do not intend to restate this important episode in full detail – this has been done before often enough –, but highlight three things: first, I argue that the Kosovo intervention must be read as a

¹³⁷⁸ For a recent study of a 'chain of translation' in security studies see Marieke de Goede, 'The Chain of Security', *Review of International Studies* 44, no. 1 (2018): 24–42. For an original study in ANT see Bruno Latour, *Pandora's Hope: Essays on the Reality of Science Studies* (Cambridge: Harvard University Press, 1999); and Michel Callon, 'An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology', *Sociological Review* 46, no. S1 (1998): 244–69.

fully 'legalized', probably the first fully 'legalized', international conflict, meaning that everything was and had to be translated into legal language (with international legal experts playing a crucial role); second, I address the international legal debate in the aftermath of this conflict about the legality of the NATO action and how the fact that it might have been illegal was translated into the by now famous speech-act 'illegal but legitimate'; third, I show how this speech-act produced new uncertainty as it is possible since then to oscillate in debates about interventions permanently between illegal and legitimate – and how thereby the question of international authority remains unsolved. I turn then (3.) to the United Nations and how the United Nations – in particular, the Secretary-General – 'used' in the aftermath of the Kosovo debate the emerging concept of the responsibility to protect in order to (re)gain authority and jurisdiction over issues concerning international interventions. After outlining the recent origins of the responsibility to protect concept, I concentrate here on how in the context of the unanimous adoption of the responsibility to protect by the UN General Assembly at its World Summit in 2005 the intervention discourse hybridized with international criminal law: protection was specified as protecting 'populations from genocide, war crimes, ethnic cleansing and crimes against humanity', i.e. from international crimes. The next section (4.) analyses institutional practises as projects to 'materialize', 'implement', 'mainstream' and/or 'operationalize' the responsibility to protect within the UN system, particularly by the Secretary-General. In this context, I will explore mainly two developments: first, the idea that the protection of 'populations from genocide, war crimes, ethnic cleansing and crimes against humanity' was further translated into the concept of 'atrocities crimes', serving as an umbrella term for genocide, war crimes, ethnic cleansing and crimes against humanity; second, I demonstrate how this created the conditions of possibility for the production of risk assessment tools within the United Nations. These tools attempt to evaluate the risk that atrocities crimes might take place and thereby provide a justificatory template for various forms of intervention. Yet, I point out that these strategies are not able to reduce uncertainty and ambiguity – in this context with regard to the temporality of the international legal argument. The conclusion (4.) of this chapter discusses then how the study of the production of different forms of uncertainty helps to better understand how different

jurisdictional projects struggle over discursive hegemony with regard 'of who represents the international' and 'who represents humanity'.

Before I start my analysis, let me briefly address two points. Firstly, I am not interested in the question of whether 'legitimacy' and/or the 'responsibility to protect' are moral, legal or political concepts – what is for sure they are somehow located within a semantic field of morality, law and politics.¹³⁷⁹ Rather, I follow Anne Orford's suggestion with regard to the responsibility to protect. For Orford the responsibility to protect has "normative significance".¹³⁸⁰ By emphasising this, Orford departs from such diverse questions as whether the responsibility to protect is mere political rhetoric, a tool of imperialism, insignificant or binding law. According to Orford, to reflect on the 'normative significance' means instead to treat the responsibility to protect as a "form of law [...] that allocates jurisdiction".¹³⁸¹ Secondly, methodologically this chapter differs from the previous one. While the previous chapter reconstructed how projects are attached to people, this chapter turns it around and reconstructs rather how people are attached to projects – something that shows also the methodological richness of reconstructing projects in the way as advanced in the Introduction of this thesis. In other words, I foreground less the projects of individual international legal experts and rather focuses on how projects translate into institutional practices. Here, for example, my reconstruction of implementation policies of the responsibility to protect within the United Nations system 'opens the black box' of an international organisation.¹³⁸² To reconstruct projects in such a way avoids also conceptualising

¹³⁷⁹ Yet, what is of course interesting is how the boundary between morality, law and politics is negotiated (second-order observation of the politics of boundary-drawing). Take for example the following statement of the UN Secretary-General Ban Ki-moon: 'The responsibility to protect provides a political framework based on fundamental principles of international law', United Nations Secretary-General, 'Responsibility to Protect: Timely and Decisive Response', A/66/874 – S/2012/578 (2012), 16.

¹³⁸⁰ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), 22.

¹³⁸¹ Orford, 25.

¹³⁸² For a different recent attempt 'to open the black box' of an international organisation see: Alexander E. Kentikelenis and Leonard Seabrooke, 'The Politics of World Polity: Script-Writing in International Organizations', *American Sociological Review* 82, no. 5 (2017): 1065–92.

these projects in terms of a linear, teleological story.¹³⁸³ Rather, this chapter foregrounds struggle and contestation.¹³⁸⁴

2. Kosovo, Legitimacy and the Production of Semantic Uncertainty

As pointed out in Chapter 2, the concept of legitimacy is a relative newcomer in international thought. To recapitulate, although it provided (and still provides) the basis for many discussions in the semantic field of politics, law and morality in the *domestic* context, the concept was nearly absent from debates within IR and IL for a long time. In both fields, the concept was introduced to a larger audience in the 1990s and gained prominence, *inter alia*, with regard to various (explicit and implicit) interdisciplinary projects of and between scholars from both IR and IL.¹³⁸⁵ The popularity of the literature on legitimacy can also be explained by the concept's capacity to link politics, law and morality in various ways, i.e. of being neither too political, too legalistic nor too moralistic. However, at the same time, 'legitimacy' *seems* to provide a way out of many dilemmas, tensions, traps and paradoxes by providing a certain degree of compatibility to a plethora of political, legal and moral debates. As I outlined in Chapter 2 it was in particular the work of Thomas M. Franck, one of the main figures of the liberal policy-oriented Manhattan school of IL, who introduced the language of legitimacy at the beginning of the 1990s to the field of IL; and it was almost ten years later Ian Hurd's moderate constructivist approach that made it popular in IR. Since then, 'legitimacy' has become one of the core concepts for scholars of IL and IR alike and has been mobilized in the context of various academic projects. For instance, Frank and

¹³⁸³ Put differently, where I argued in Chapter 6 that reconstructing 'people with projects' does not need to study the 'intentions' of 'people', I argue now that we do not need to study the 'intentions' of 'projects'.

¹³⁸⁴ For a similar critique in the context of the responsibility to protect see Daase, 'Legalizing Legitimacy'; and Jennifer Welsh, 'Implementing the "Responsibility to Protect": Catalyzing Debate and Building Capacity', in *Implementation and World Politics: How International Norms Change Practice*, ed. Alexander Betts and Phil Orchard (Oxford: Oxford University Press, 2014), 124–43. For a general critique with regard to the moderate constructivist 'norms literature' see Friedrich Kratochwil, 'How Do Norms Matter?', in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 35–68; and Antje Wiener, *A Theory of Contestation* (Heidelberg: Springer, 2014).

¹³⁸⁵ See also Filipe dos Reis and Oliver Kessler, 'The Power of Legality, Legitimacy and the (im)possibility of Interdisciplinary Research', in *The Power of Legality: Practices of International Law and Their Politics*, ed. Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (Cambridge: Cambridge University Press, 2016), 99–124.

Hurd were both interested in the classical compliance puzzle of 'why do powerful states obey powerless rules and norms' and here particularly the rules and norms of international law, which apparently (seem to) lack effective enforcement mechanisms if compared to the law of the domestic context. Franck and Hurd, although taking different avenues, argue that the belief in the legitimacy of those rules and norms is the solution to solve the compliance puzzle.

Other scholars, such as Allen Buchanan and Robert Keohane, were less interested in the 'empirical' or 'descriptive' dimension of the compliance question and rather presented their work as contribution to 'normative' research. Buchanan and Keohane, for example, designed 'a standard of legitimacy' that should serve 'global governance institutions' (with international law being one of them) in order to enhance their 'democratic legitimacy' and thereby improve their 'rates of compliance'. And, more recently, Jutta Brunnée and Stephen Toope developed an 'interactional account of international law', which by introducing the notion of legitimacy tried to fuse the neo-natural law approach of Lon Fuller with IR's practice turn.

Although these literatures and debates were important for and widely spread in the academic context, it was only in the aftermath of the Kosovo campaign of the North Atlantic Treaty Organisation (NATO) that the concept of legitimacy achieved significance within international policy circles and, hence, *beyond the confines academia*. The move out of academia produced, as I shall argue in the first part of this chapter, a fundamental transformation of the concept's meaning and, simultaneously, also changed the structure of the international legal argument. Although Kosovo presents certainly an exception in international law, it nevertheless signifies for many observers one of the most important – if not even *the* most important – turning point(s) in the intervention debate as it was the first time that Western powers (openly) challenged and transgressed the norm of non-intervention. This transformation should become, as Anne Orford notes, an "immediate trigger for the development of the responsibility to protect concept, and has since then been invoked repeatedly [...] as desirable precedent for

international intervention".¹³⁸⁶ In order to better understand the significance of Kosovo, I will argue that Kosovo was the first fully legalized international conflict (2.1); then turn to the work of the Independent International Commission on Kosovo (IICK) in the aftermath of the NATO bombing and here, in particular, concentrate on the evaluation that the bombing was 'illegal but legitimate' (2.2); and finally show how the speech-act 'illegal but legitimate' produced new uncertainty (2.3).

2.1 The first fully legalized conflict?

On 24 March 1999 NATO initiated, after months of warnings, resolutions and negotiations, its air campaign in Kosovo under the name 'Operation Allied Force'. The bombings should last for 78 days and ended on 10 June 1999 with the adoption of UNSC Resolution 1244 (establishing an international interim administration for Kosovo). 'Operation Allied Force' was the first major military operation in the history of the Alliance and only its second 'out of area' campaign (the first was in Bosnia in 1995).¹³⁸⁷ NATO justified the intervention as a response to a pending and unfolding humanitarian catastrophe that was caused by an ongoing civil war between the Federal Republic of Yugoslavia (FYR) and the Kosovo Liberation Army (KLA) and where the possibility of systematic ethnic cleansing of Kosovar Albanian civilians through FYR military forces was considered as highly likely.¹³⁸⁸

¹³⁸⁶ Anne Orford, 'The Politics of Anti-Legalism in the Intervention Debate', *Global Policy* (blog), 2014. Importantly, Hilary Charlesworth has highlighted that it is not that clear what 'Kosovo' (or 'the Kosovo crisis') actually means as the term served first as an 'umbrella for a range of phenomena'. As such 'the "crisis" of Kosovo (meaning the NATO intervention) has become an international legal trope for the whole confusing history of the region. "Kosovo" is a synecdoche, a figure of speech in which the part stands for the whole', Hilary Charlesworth, 'International Law: A Discipline of Crisis', *The Modern Law Review* 65, no. 3 (2002): 377, 386. While Charlesworth rightly claims that international lawyers should unpack the different layers of the conflict, most mainstream international lawyers, however, did not follow her suggestion and still use 'Kosovo' as rather unspecific 'umbrella term'.

¹³⁸⁷ Anne Orford, 'NATO, Regionalism, and the Responsibility to Protect', in *Charter of the North Atlantic Treaty Organisation Together with Scholarly Commentaries and Essential Historical Documents*, ed. Ian Shapiro and Adam Tooze (New Haven: Yale University Press, 2018).

¹³⁸⁸ For an argument that an actual proof of an unfolding situation was missing, see Jonathan I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', *American Journal of International Law* 93, no. 4 (1999): 839–840.

What is interesting for the general background of this thesis is that ‘Kosovo’ could be summarized as the first fully ‘legalized’ conflict and thus provided an extensive playground for international lawyers as the conflict, as Hilary Charlesworth sums up,

“distilled many of the big questions of international law [...]. Kosovo offered questions about sovereignty and self-determination, grave human rights abuses and expulsions, condemnation by international institutions, failed peace negotiations, military intervention by a regional alliance, international peace keeping and the role of international criminal tribunals. It was a contemporary Cuban missile crisis. Kosovo gave international lawyers a sense of relevance, of being exhilaratingly close to the heart of grand and important issues of our time”.¹³⁸⁹

‘Kosovo’ gave international lawyers this ‘sense of relevance’ as it presented the first case of comprehensive ‘lawfare’ on an international level. Compared to previous conflicts legal experts were much more involved in important decision-making processes and, at the same time, the language of law was widely spread.¹³⁹⁰ For example, for the first time military lawyers were before and during the bombings part of the chain of decisions when it came to the selection of target folders. These folders were mainly compiled by computerized operations. As NATO relied in this war on air strikes only and as target selection was processed through computerized models, Michael Ignatieff coined Kosovo the first “virtual” or “postmodern war in history”.¹³⁹¹ Ignatieff describes the crucial role of military lawyers in this context by providing the following illustrative example:

“At a base in Germany, a military lawyer from the Judge Advocate General’s office, sitting at his computer screen, would assess the target

¹³⁸⁹ Charlesworth, ‘International Law’, 381. As such Kosovo can also be seen as a debate within the profession of international lawyers ‘about what sort of law we [the international lawyers] practice’, Martti Koskenniemi, “‘The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law”, *The Modern Law Review* 65, no. 2 (2002): 162.

¹³⁹⁰ Cf. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2005), 270.

¹³⁹¹ Michael Ignatieff, *Virtual War: Kosovo and Beyond* (New York: Picador, 2000), 112.

in terms of the Geneva Conventions governing the laws of war. He would rule whether it was a justifiable military object in legal terms and whether its value outweighed the potential costs in collateral damage. A military lawyer also applied 'the reasonable person standard' of judgement to the fine line separating military and civilian targets".¹³⁹²

Apart of this strong involvement of legal experts in the selection and review of potential targets, 'Kosovo' had also serious repercussions in the practice of international courts and tribunals. On 22 May 1999, almost two month after the beginning of the NATO action, Carla Del Ponte, who served at this time as Prosecutor of the ICTY, presented an indictment against FYR's President Slobodan Milosevic and other leaders of the country charging them with "crimes against humanity" and "violations of the laws or customs of war".¹³⁹³ Simultaneously, however, Del Ponte dismissed, in June 2000, on the basis of recommendations from a review committee, which had been established earlier on her behalf, the prosecution of NATO actors for the bombing campaign.¹³⁹⁴ Moreover, at a different occasion, the FYR brought NATO member states on 29 April 1999 before the ICJ. The ICJ rejected however on 2 June 1999 this request by claiming *non liquet*: "the Court manifestly lacks jurisdiction in order to entertain Yugoslavia's Application".¹³⁹⁵ And finally, Kosovo witnessed an extended rule of law mission¹³⁹⁶ and its declaration of independence rendered an advisory opinion by the ICJ.¹³⁹⁷

¹³⁹² Ignatieff, 100–101. For a (self-)description and (self-)evaluation of an involved military lawyer, see James E. Baker, 'When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict', *Naval War College Review* 55 (2002): 11–24.

¹³⁹³ International Criminal Tribunal for the Former Yugoslavia, Prosecutor, 'Initial Indictment "Kosovo"', IT-99-37 (1999). On the basis of the indictment, Milosevic was surrendered in June 2001 to the ICTY. The trial began in February 2002 (see also my discussion at the outset of the previous chapter of the trial's opening statement by Carla Del Ponte) and ended with Milosevic's death in March 2006.

¹³⁹⁴ As the report states: 'On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences', International Criminal Tribunal for the Former Yugoslavia, 'Final Report of the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia', 13 June 2000, para. 90. For a critique of the rejection as a *non liquet*, see Natalino Ronzitti, 'Is the Non Lique of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia Acceptable?', *International Review of the Red Cross* 82, no. 840 (2000): 1017–27.

¹³⁹⁵ International Court of Justice, 'Case Concerning Legality of Use of Force (Yugoslavia vs. United States)' (1999), para. 29.

While the rejection of the decision of the Prosecutor of the ICTY as well as the *non liquet* of the ICJ were criticised by the FYR government, these decisions nevertheless resemble the opinion(s) of most international lawyers at that time. Here the legal justification of ‘Operation Allied Force’ and, in particular, of whether there existed a ‘right’ to intervene (i.e., rather the question of the *jus ad bellum* than the *jus in bello*) caused justificatory problems to most members of the ‘invisible college of international lawyers’ as the campaign was conceived as a *clear breach* of Article 2(4) of the UN Charter – and hence also of international law – as it was neither an act of (collective) self-defence under Article 51 nor did the Security Council authorize it under Chapter VII. The NATO bombings were thus simply considered as illegal by most commentators. Nevertheless, there was the *feeling* that there existed at the same time a strong moral duty to take military action.¹³⁹⁸ Prominent international lawyers considered the campaign as illegal but, at the same time, as morally justified and, moreover, politically necessary. However, to frame the issue only in terms of political necessity (like in the language of ‘national interest’) or morality as it has been the case in previous discussions on interventions, and thus leave any considerations of the legality of the action aside, seemed also to be an unacceptable avenue:¹³⁹⁹ the legalization of the discourse on intervention was already too advanced. Moreover, international lawyers felt uncomfortable if international law – and particularly the international law of the post-Cold War era – would not be able to guarantee the protection of the Kosovar population against international crimes – as the fear of a new ‘Srebrenica’ or ‘Rwanda’ was looming large on the horizon.¹⁴⁰⁰

¹³⁹⁶ For further discussion see, for example, Maj Grasten, ‘Whose Legality? Rule of Law Missions and the Case of Kosovo’, in *The Power of Legality: Practices of International Law and Their Politics*, ed. Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (Cambridge: Cambridge University Press, 2016), 320–42.

¹³⁹⁷ Arguing now that Court has jurisdiction and that the declaration of independence ‘did not violate international law’, International Court of Justice, ‘Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)’ (2010), para. 123.

¹³⁹⁸ For a critique, see David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention*, 2nd ed. (London: Pluto Press, 2006).

¹³⁹⁹ For instance in 1973 it was still possible to argue that humanitarian intervention ‘belongs in the realm not of law but of moral choice, which nations, like individuals, must sometimes make’, Thomas M. Franck and Nigel S. Rodley, ‘After Bangladesh: The Law of Humanitarian Intervention by Military Force’, *American Journal of International Law* 67, no. 2 (1973): 304.

¹⁴⁰⁰ On both events, Rwanda and Srebrenica, the UN should publish extensive reports later that year: United Nations Secretary-General, ‘Report of the Secretary General to General Assembly Resolution 53/35: The Fall of Srebrenica’, A/54/549 (1999); and United Nations Security Council,

In this setting, for example, Bruno Simma highlights that the intervention has been a transgression of the rules of the Charter but that “only a thin red line separates NATO’s action on Kosovo from international legality”.¹⁴⁰¹ Simma continues to write:

“The lesson which can be drawn from this is that unfortunately there do occur ‘hard cases’ in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice to act outside the law”.¹⁴⁰²

However, for Simma such breaches of international law are justified when they “remain singular” and “as an explicit *ultima ratio*” – something that was for him the case in respect to NATO’s action.¹⁴⁰³ The (self-proclaimed) ‘enlightened positivist’ Simma seems, however, to be uncomfortable to agree completely to a position on ‘hard cases’ à la Dworkin.¹⁴⁰⁴ Consequently, Simma insists that unilateral

‘Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda’, S/1999/1257 (1999). For a more comprehensive discussion of different positions of international legal commentators, see Charlesworth, ‘International Law’, 379–381, 386–387; and Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (München: Beck, 2001), 319–325. Even critical lawyers like Koskeniemi “have taken the ambivalent position that it was both formally illegal and morally necessary”, Koskeniemi, ‘The Lady Doth Protest Too Much’, 162.

¹⁴⁰¹ Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, *European Journal of International Law* 10, no. 1 (1999): 22.

¹⁴⁰² Simma, 22.

¹⁴⁰³ Simma, 229 (emphasis in the original).

¹⁴⁰⁴ On Dworkin’s original argument on ‘hard cases’, see Ronald Dworkin, ‘Hard Cases’, *Harvard Law Review* 88, no. 6 (1975): 1057–1109. In a similar vein as, for example, Antonio Cassese, Simma attempts to ‘stretch’ positivism by distinguishing between ‘classic’ and ‘modern’ (also ‘enlightened’) positivism. Simma describes classic positivism (in a piece co-authored with Andreas Paulus) as follows: ‘Law is regarded as a unified system of rules that, according to most variants, emanate from state will. This system of rules is an ‘objective’ reality and needs to be distinguished from law ‘as it should be.’ Classic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g., arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis; there is only hard law, no soft law. For some, the unity of the legal system will provide one correct answer for any legal problem;’ for others, even if law is ‘open-textured,’ it still provides determinate guidance for officials and individuals’. On the other side, ‘enlightened positivism is identical neither with formalism nor with voluntarism. Both custom and general principles cannot simply be reduced to instances of state will. So-called soft law is an important device for the attribution of meaning to rules and for the perception of legal change. Moral and political considerations are not alien to law but part of it. However, formal sources remain the core of international legal discourse. Without them, there is no ‘law properly so-called.’ Only when linked to formal sources recognized as binding by the international community does law serve the decision maker in the search for a balance between idealism and realism, common values and ideological neutrality, apology and utopia’, Bruno Simma and Andreas L. Paulus, ‘The Responsibility

interventions must remain an *exception* and that in the future NATO has to subordinate again under the system of collective security of the UN Charter.

A slightly different argument was advanced by Antonio Cassese who claimed that “from an *ethical* viewpoint resort to armed forces was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*.”¹⁴⁰⁵ Interestingly, however, Cassese observes “nascent trends in world community”, which indicate that humanitarian interventions might become legal under customary international law in the future (*de lege ferenda*).¹⁴⁰⁶ Even if objective criteria of custom might be lacking, subjective criteria (particularly, *opinio necessitatis*) might be, as Cassese notes, “*at part* materialized”.¹⁴⁰⁷ As custom is only ‘at partly materialized’, Cassese considers humanitarian interventions as (still) illegal. Nevertheless, the contours of an international law of the future, which should not “be utterly contrary to any principle of humanity”, appear on the horizon already.¹⁴⁰⁸ In other words, in contrast to Simma, who emphasises the role of formal sources and attempts to remain within the institutional setting of the post-Cold War era, Cassese locates the instances, which guarantee humanitarian values, in a rather vague, non-institutionalised construct of an ‘international’ or ‘world community’.¹⁴⁰⁹ To speak of the emergence of such a future international or world community and to interpret customary international law mainly by referring to subjective criteria of *opinion juris* and/or *opinion necessitatis* presents of course only another reflection

of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, *American Journal of International Law* 93, no. 2 (1999): 304, 307–308. For Simma, in particular, human rights provide a vocabulary to challenge the boundaries of classic positivism and to turn it into its more ‘enlightened’ version. See also the discussion in Eric Stein, ‘Bruno Simma, The Positivist?’, in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, ed. Ulrich Fastenrath et al. (Oxford: Oxford University Press, 2011), 19–31.

¹⁴⁰⁵ Antonio Cassese, ‘Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’, *European Journal of International Law* 10, no. 1 (1999): 25 (emphasis in the original).

¹⁴⁰⁶ Cassese, 27.

¹⁴⁰⁷ Antonio Cassese, ‘A Follow-Up: Humanitarian Countermeasures and *Opinio Necessitatis*’, *European Journal of International Law* 10, no. 4 (1999): 797.

¹⁴⁰⁸ Cassese, 797, 799 (emphasis in the original).

¹⁴⁰⁹ On this paradigm shift from ‘collective’ to ‘unilateral humanitarian interventions’, see Anne Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’, *European Journal of International Law* 10, no. 4 (1999): 680. For a critical reflection of the international legal argument with regard to interventions in the context of the immediate post-Cold War era, i.e. intervention under the roof of the UN Security Council, see Anne Orford, ‘Locating the International: Military and Monetary Interventions after the Cold War’, *Harvard International Law Journal* 38, no. 2 (1997): 443–85.

of Cassese's general project of 'realizing utopia' by means of 'critical positivism' (see my discussion in Chapter 6).

What unites these narratives in the end is the claim that the mantra of Western modern statecraft, namely that only sovereign states with exclusive jurisdiction can guarantee human rights or peace, is inversed: where for modernity the state was the guarantor of peace against the struggles of the 'international', it is now the state that becomes the problem while the 'international' brings the solution. In line with this, it is argued now that complying with traditional law may aggravate the problem, while breaking its formalistic rules may help to find a solution.¹⁴¹⁰ As Anne Orford frames this development, today the "international order, which represents values such as humanitarianism and justice, is threatened by states and leaders who have no commitment to human rights or peace. [...] In the case of Kosovo, the international community may have been acted outside of the law, but such action was not taken in the name of self-interest or old-fashioned imperialism, but for the collective good".¹⁴¹¹ In short, the option not to intervene for reasons of positive international law was widely discarded as manifestation of a morally and politically blind 'legalism'.¹⁴¹²

2.2 'Illegal but Legitimate'

In this broader constellation, the notion of legitimacy brought something like a 'solution' to the 'problem(s)' and 'dilemma(s)' of many commentators.¹⁴¹³ Here, it was in particular the Independent International Commission on Kosovo (IICK), which introduced this 'solution' to a broader public. The IICK was founded in the

¹⁴¹⁰ This corresponds with Allen Buchanan idea of 'illegal international legal reform', i.e. that breaking the law might help to develop the law. One of the cases Buchanan had in mind was NATO's Kosovo campaign. See Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), 456–459; and Allen Buchanan, 'From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform', *Ethics* 111, no. 4 (2001): 673–705. See also my discussion of Buchanan's work in Chapter 2.

¹⁴¹¹ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), 45.

¹⁴¹² Or, more precisely: a 'caricature of "legalism"': 'a pedantic and overly scholastic concern with rules that make sense on the paper but bear no relation to reality', Orford, 'The Politics of Anti-Legalism in the Intervention Debate'.

¹⁴¹³ A shorter (and to some extent different) version of the argument of this subsection can be found in dos Reis and Kessler, 'Power of Legality, Legitimacy and the (im)possibility of Interdisciplinary Research', 111–112.

aftermath of the NATO air campaign on initiative of the Swedish Prime Minister Göran Persson and was endorsed by UN Secretary-General Kofi Annan. The IICK can be described as an international expert commission *par excellent*. It was chaired by Richard Goldstone, who was a former member of the South African Constitutional Court and also the first chief prosecutor of both the ICTY and ICTR. Moreover, it was composed of members like, for example, the international lawyer Richard Falk, the historian and writer Michael Ignatieff, the political scientist Marie Kaldor as well as a number of former diplomats and human rights activists.¹⁴¹⁴ The task of the Commission was to, *inter alia*, “identify the norms of international law [...] brought to the fore by the Kosovo war and the adequacy of present norms and institutions in preventing or responding to comparable crisis in the future”.¹⁴¹⁵

The major outcome of the IICK was a concluding report, published in 2000.¹⁴¹⁶ In this report the IICK states that there “was an impending and unfolding humanitarian catastrophe for the Kosovo Albanian population”.¹⁴¹⁷ The situation was, as the Commission states, severe as “Serb oppression included numerous atrocities that appeared to have the character of crimes against humanity in the sense it has been understood since the Nuremberg Judgement in 1945”.¹⁴¹⁸ Moreover, the report concludes that negotiations with Milosevic were nearly impossible as the Serbian President was “an adversary with a track record of manipulation and criminality”.¹⁴¹⁹ In this context the report “raises a central question—are the constraints imposed by international law on the non-defensive

¹⁴¹⁴ For a complete list of its members, see Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), 331–335. On the Commission’s work see also the (self-)assessment by Richard J. Goldstone and Nicole Fritz, ‘Fair Assessment: The Independent International Commission on Kosovo’, in *International Commissions and the Power of Ideas*, ed. Ramesh Thakur, Andrew F. Cooper, and John English (Tokyo: United Nations University Press, 2005), 167–79.

¹⁴¹⁵ Independent International Commission on Kosovo, *The Kosovo Report*, 331 (mission statement).

¹⁴¹⁶ Independent International Commission on Kosovo, *The Kosovo Report*. Two policy reports draw similar conclusion. One was on Danish initiative: Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999). The second on Dutch initiative: Advisory Council on International Affairs (AIV), ‘Humanitarian Intervention’, April 2000.

¹⁴¹⁷ Independent International Commission on Kosovo, *The Kosovo Report*, 163.

¹⁴¹⁸ Independent International Commission on Kosovo, 164.

¹⁴¹⁹ Independent International Commission on Kosovo, 163.

use of force adequate for the maintenance of peace and security in the contemporary world?”.¹⁴²⁰ And it continues by underlying that the

“question is particularly relevant where force is used for the protection of a vulnerable people threatened with catastrophe. If international law no longer provides acceptable guidelines in such a situation, what are the alternatives? In responding to these challenges, the Commission considers the international law controversy provoked by the NATO campaign. It also puts forward an interpretation of the emerging doctrine of humanitarian intervention. This interpretation is situated in a grey zone of ambiguity between an extension of international law and a proposal for an international moral consensus. In essence, this grey zone goes beyond strict ideas of *legality* to incorporate more flexible views of *legitimacy*”.¹⁴²¹

For the Commission this kind of ‘flexibility’ was provided – although on “shaky legal grounds”¹⁴²² – by pointing out that the status of human rights had improved within the United Nations since the establishment of the Charter in 1945 and has become, in the meantime, an important vocabulary to challenge the non-intervention paradigm.¹⁴²³ Moreover, as the report observes, the form and reality of conflicts has changed after the end of the Cold War. While the UN Charter stands in the tradition of the “*international wars*” of the Cold War, nowadays ‘new wars’ (as pointed out above, Mary Kaldor was one of its expert members) in the form of “*intra-national crises of a wide variety*” have become increasingly important.¹⁴²⁴ This line of argumentation brought the IICK to its famous conclusion, namely “that the NATO military intervention was *illegal but legitimate*. It was illegal because it did not receive prior approval by the United Nations Security Council. However, the Commission considers that the intervention had the effect of liberating the

¹⁴²⁰ Independent International Commission on Kosovo, 164.

¹⁴²¹ Independent International Commission on Kosovo, 164 (emphasis in the original). The report’s understanding of legitimacy was strongly influenced by Thomas Franck’s account of the notion of legitimacy and the way Franck links it to fairness, Goldstone and Fritz, ‘Fair Assessment’, 170–172. On Franck’s take on legitimacy and fairness see my discussion in Chapter 2.

¹⁴²² Independent International Commission on Kosovo, *The Kosovo Report*, 166.

¹⁴²³ Independent International Commission on Kosovo, 167–169. For a similar view, see for example Simma, ‘NATO, the UN and the Use of Force’.

¹⁴²⁴ Independent International Commission on Kosovo, *The Kosovo Report*, 185.

majority of population of Kosovo from a long period of oppression under Serbian rule".¹⁴²⁵

In line with this, the IICK argues that international law should adapt to the reality of 'new wars' in a post-Cold War environment and accept that the 'crisis' and 'exception' of Kosovo might become the 'new normal'.¹⁴²⁶ Subsequently, the report acknowledges that there exists now the

"need to close the gap between legality and legitimacy. The Commission believes that the time is now ripe for the presentation of a principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes and which could be used to assess claims for humanitarian intervention".¹⁴²⁷

In particular, the UN General Assembly or regional organisations should authorize humanitarian interventions in the case of an UN Security Council deadlock.

In 2012, more than ten years after the publication of the IICK's *Kosovo Report*, the international lawyer Richard Falk, who was a member of the Commission, noted that "the Kosovo War of 1999 [was] the birthplace of reliance on the legality/legitimacy distinction".¹⁴²⁸ For Falk, the notion of legitimacy promises "meta-legal authority" and "provides a flexible alternative to the sort of binary assessments that have no options other than 'legal' and 'illegal'. This flexibility

¹⁴²⁵ Independent International Commission on Kosovo, 4 (emphasis added). For similar formulations in the report, see Independent International Commission on Kosovo, 186 and 289. A similar conclusion was also drawn by a British governmental expert commission: '[W]e conclude that NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds' House of Commons Foreign Affairs Select Committee, 'Fourth Report', 23 May 2000, para. 138.

¹⁴²⁶ For a general argument of how exceptional measures are normalised by means of international legal expertise, see Filipe dos Reis, 'Law, Politics and State(s) of Emergency', *New Perspectives. Interdisciplinary Journal of Central & East European Politics and International Relations* 25, no. 2 (2017): 136–41.

¹⁴²⁷ Independent International Commission on Kosovo, *The Kosovo Report*, 10.

¹⁴²⁸ Richard Falk, 'Introduction: Legality and Legitimacy: Necessities and Problematics of Exceptionalism', in *Legality and Legitimacy in Global Affairs*, ed. Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (Oxford: Oxford University Press, 2012), 9. Similarly: 'Reliance on the distinction between legality and legitimacy first achieved prominence in the report of the Independent International Commission on Kosovo' Richard Falk, Mark Juergensmeyer, and Vesselin Popovski, 'Preface', in *Legality and Legitimacy in Global Affairs*, ed. Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (Oxford: Oxford University Press, 2012), viii.

permits arguments about the comparative claims of law, morality, and politics to be put forth in any setting of decision or policy formation, and yet sustains the relevance of international law even in circumstances where the primary norm has been justifiably set aside”.¹⁴²⁹

Put differently, by uttering the speech act of ‘illegal but legitimate’ the concept of legitimacy itself reveals its reflexive and performative dimension. Thus, rather than evaluating whether ‘Kosovo’ was in the end legal, illegal, legitimate and/or illegitimate, I am more interested in excavating *what ‘legitimacy’ actually ‘does’ ‘after Kosovo’, i.e. to focus on the concepts’ productive and performative dimension*. It seems that after Kosovo ‘legitimacy’ is not merely a descriptive (or ‘constative’) device with regard to something factual (e.g., how legitimate *is* a specific system of international legal rules or institutions?) or normative (e.g., how *should* international legal rules and institutions be designed in order to make global governance more legitimate?) anymore, but rather ‘legitimacy’ gains agentic capacity and the power to draw, redraw and make certain boundaries invisible. This constellation is, e.g., captured by Koskeniemi’s critical assessment of the notion. For Koskeniemi, the concept of legitimacy presents one of the central shifts in international law’s ‘turn to ethics’.¹⁴³⁰ Koskeniemi complains mainly (and here, he should disagree with Falk) about the flexibility and elusiveness of the concept.¹⁴³¹ In other words, what has been for supporters of the new language of legitimacy like Falk its strength – namely its flexibility – presents for its critics the main problem. As Koskeniemi argues, ‘legitimacy’, used in such a way, opens a “normative space or field of jurisdiction” but represents within this space only a

¹⁴²⁹ Falk, ‘Introduction: Legality and Legitimacy’, 25.

¹⁴³⁰ For a ‘focussed genealogy’ of legitimacy as the end-product of the ‘turn to ethics’ see Koskeniemi, ‘The Lady Doth Protest Too Much’, 163–171; and Martti Koskeniemi, ‘Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism’, *Alternatives* 7, no. 2 (2003): 349–73. Similarly, the language of legitimacy presents for Koskeniemi also an important step in another turn in international law, namely the ‘turn to managerialism’. For an argument in this regard see, for example, Martti Koskeniemi, ‘Miserable Comforters: International Relations as New Natural Law’, *European Journal of International Relations* 15, no. 3 (2009): 409–410. See also my discussion below in Chapter 2 and Chapter 4.

¹⁴³¹ In a similar vein David Kennedy argues: ‘Although modern humanitarian law need not be determinate to be effective - flexibility may indeed be the secret of its success - in any given iteration, it appeals outward, to the Charter, to law, or to a universal ethical understanding. There is a split, in other words, between the way the vocabulary is widely understood to function - flexibly, openly, interactively - and the way one expresses oneself in it ethically, self-confidently, definitely, judgementslly. The key power in such ongoing conversation is *legitimacy*’, Kennedy, *The Dark Sides of Virtue*, 274 (emphasis in the original).

“mediate concept” that is “rhetorically successful” as it can neither be “pinned down” on “formal rule” nor on “some controversial theory of justice”.¹⁴³² Yet, this kind of criticism does certainly not lack some irony as the indeterminacy of concepts was the central argument of critical international legal scholars for a long time and was never presented as a ‘problem’.

In any case, it is for Koskeniemi mainly the permanent iteration (or iterability?) in the context of different political projects that gives ‘legitimacy’ such a central position:

“By saying ‘legitimacy’ as often as possible and in connection with as many and as controversial political actions as possible, actions that cannot be seriously discussed in terms of lawfulness or moral substance, receive a sense of acceptability and naturalness that is precisely the function of ideology to attain”.¹⁴³³

Legitimacy appears here to be both normative and concrete at the same time. It introduces a new level of *uncertainty* and *indeterminacy* to the intersection of law, morality and politics on a global level. What Koskeniemi fears in this regard is that ‘legitimacy’ opens Pandora’s box as different projects of power politics can be justified in the name of human rights, international community and/or global civil society.¹⁴³⁴ Moreover, the rhetoric of legitimacy is so successful, as it is hard to ‘be against it’:

¹⁴³² Koskeniemi, ‘Legitimacy, Rights, and Ideology’, 372, 362.

¹⁴³³ Koskeniemi, 368.

¹⁴³⁴ Take for instance Anne Marie Slaughter’s justification of the 2003 US-British-led invasion of Iraq. Slaughter argued in an op-ed article two days before the campaign started that it could be justified as ‘illegal but legitimate’ and concludes from this: ‘But depending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal’, Anne-Marie Slaughter, ‘Good Reasons for Going Around the U.N.’, *New York Times*, 18 March 2003. However, only one year later, Slaughter acknowledges that the invasion was ‘Illegal and Illegitimate’ - precisely because no weapons of mass destruction were ‘found’. See Anne-Marie Slaughter, ‘The Use of Force in Iraq: Illegal and Illegitimate’, *American Society of International Law Proceedings* 98 (2004): 262–63. Another example is Michael Ignatieff, who was first very much in favour of the invasion, see Michael Ignatieff, ‘Why Are We In Iraq? (And Liberia? And Afghanistan?)’, *New York Times*, 7 September 2003; and later described this as an error, see Michael Ignatieff, ‘Getting Iraq Wrong’, *New York Times*, 5 August 2007. Yet, other commentators such as Goldstone and Fritz do not share Koskeniemi’s concerns and deny that the IICK’s endorsement of humanitarian intervention did open the door to legitimate all kinds of intervention as the report highlighted the importance of a ‘direct protection of the victimized population’. For Goldstone and Fritz this was the case in Kosovo but it was not so in Iraq (or Afghanistan), Goldstone and Fritz, ‘Fair Assessment’, 175.

“Unlike realist fixation on states and power, or idealist moorings on international law and morality, ‘legitimacy’ possesses an elusiveness well adapted to the realities of a fluid, complex and globalising world. Containing (unlike law) no commitment to particular institutional forms and (unlike morality) no implication of transcendental standards, as well as unburdened by the negative connotations linked to words such as ‘legalism’ and ‘moralism’, the notion of ‘legitimacy’ redescribes the international world in terms of categories whose beneficiality seems self-evident: lawfulness, fundamental values and human rights”.¹⁴³⁵

2.3 The Production of Semantic Uncertainty

In this context three observations are important. Firstly, the turn to legitimacy language is also linked to a shift in the politics of expertise. While the language of legitimacy – particularly, after Kosovo – is usually associated to a broader turn to legal language on a global level, i.e. the ‘legalization’ of the discourse of the ‘international’, it is not the lawyer (nor the political philosopher, nor the diplomat of classical realism) who determines whether an action is legitimate or not but increasingly the empirical social scientist and/or the policy elite who measures the legitimacy – in terms of a somehow operationalized legitimacy belief – among global civil society actors.¹⁴³⁶

Secondly, the conceptual pair legality/legitimacy constitutes a space for different discursive positions oscillating between ‘normativity’ and ‘concreteness’

¹⁴³⁵ Koskeniemi, ‘Legitimacy, Rights, and Ideology’, 350.

¹⁴³⁶ Koskeniemi, 351. Recently, Richard Falk postulated such an understanding of the relationship between legality and legitimacy. As Falk argues in his assessment of ‘legitimacy wars’: ‘where legitimacy and legality factors overlap, civil society will lend support to humanitarian intervention (as in Rwanda, Darfur, East Timor); where legitimacy supports a call for humanitarian intervention, but legality inhibits, civil society will be split (as in Kosovo); where legitimacy factors are negative or even ambiguous, and legality inhibits, then civil society will be overwhelmingly opposed to military forms of intervention (as in Iraq)’, Richard Falk, *Humanitarian Intervention and Legitimacy Wars: Seeking Peace and Justice in the 21st Century* (Abingdon, Oxon: Routledge, 2015), 59. For a critical discussion of the notion of ‘global society’ see Jens Bartelson, ‘Is There a Global Society?’, *International Political Sociology* 3, no. 1 (2009): 112–15.

– i.e., Koskenniemi’s ‘deep structure’ of the international legal argument. For instance, in discussions about the legality of the intervention in Kosovo, for supporters

“making the law/legitimacy differentiation affirmed the speaker’s legal-technical competence while testifying to his or her moral rectitude: ‘of course, the intervention may not have been lawful under the UN Charter. But it was an acceptable response to a morally compelling need to act now’. [...] An opponent of the intervention would immediately respond: ‘Well you say you are acting out of noble moral motives. But I know that in fact you are just making a political move so as (for example) to support illegality’”.¹⁴³⁷

This new argumentative structure in the context of humanitarian interventions was recently also evaluated by Anne Orford. As Orford notes, after Kosovo it has become possible to frame debates about interventions by permanently oscillating between the two poles of ‘legality’ and ‘legitimacy’, where legality is understood as dogmatic legalism and legitimacy as the possibility to construct the better and more flexible law of the future. To understand this new dynamic, it is worth to quote the following longer paragraph by Orford:

“It has become conventional to structure debates about international intervention in terms of an opposition between legality and legitimacy. In such debates, ‘legality’ is often presented as involving a blind adherence to restrictive rules of limited relevance to contemporary security challenges and doubtful moral value in the face of pressing humanitarian crises. Legitimacy, on the other hand, is presented as everything that law ought to be – it results from decision-making that is principled yet pragmatic, taken by actors who are representatives of conscience yet guarantors of protection, concerned with means yet never at the expense of ends, and leads to interventions undertaken by politically effective operators who are nevertheless committed to

¹⁴³⁷ Koskenniemi, ‘Legitimacy, Rights, and Ideology’, 360–361.

humane values and able to balance the demands of security and justice. While legality is rigid, legitimacy is flexible. While legality is a manifestation of the suspect political machinations of powerful states, legitimacy is the manifestation of a meaningful commitment to ending human suffering and realising the rights of the individual. While legality involves a misplaced faith in the mechanical application of rules to determine whether or not intervention is justified, legitimacy involves the establishment of clear criteria that can guard against the political misuse of intervention for other than humanitarian ends. Of course, if this is what we understand the choice between legality and legitimacy to involve, then stopping to ask what actions are legally available in the face of humanitarian crisis or civil war can at best lead to irrelevance and at worst to complicity with evil”.¹⁴³⁸

Thirdly, the new flexibility of legality/legitimacy – together with the ‘new interventionism’ of *a regional organisation* such as NATO – marks also an *important shift on a jurisdictional level*. NATO’s Kosovo campaign has to be read as an attack on the jurisdictional project of the modern nation state, i.e. the idea of exclusive territorial jurisdiction with the state designed as ‘container’, as it transferred the jurisdiction to intervene to an international (organisational) level. As Orford summarises for “states subject to intervention, this was indeed the nightmarish end-point of the move away from textually defined limits to external intervention in domestic jurisdiction of states, and the abandonment of the commitment to principles of sovereign equality and self-determination”.¹⁴³⁹ Moreover, this development presents not only a challenge to the idea of exclusive jurisdiction of the modern statecraft as it established also the stage for a new jurisdictional competition of who actually represents ‘humanity’ on an international level – for example, which kind of organisational form. As I will reconstruct in the next section, it was the UN that attempted to assemble and transfer the jurisdiction over interventions under its own roof.

¹⁴³⁸ Orford, ‘The Politics of Anti-Legalism in the Intervention Debate’.

¹⁴³⁹ Orford, *International Authority and the Responsibility to Protect*, 177–178.

In order to sum this section up and to weave some threads together: So far I have argued that the notion of legitimacy brought a new level and mode of indeterminacy (semantic uncertainty) to the discourse of law and politics, particularly in the context of interventions. In these discussions, a number of critical international lawyers, lead by Koskeneniemi, perceived this new ‘flexibility’ as a ‘problem’. As I pointed out this bears of course some irony, as it was the early project of critical international lawyers – as well as critical constructivist (see Chapter 3) – to carve out the indeterminacy of the international legal argument. Indeterminacy was for these early critical scholars not seen as a ‘problem’ but rather as a ‘quasi-natural’ element of every discourse and, subsequently, as something that cannot be solved but should rather be perceived as an opportunity to re-politicize the seemingly a-political discourse of politics.¹⁴⁴⁰ Now, and this turns the positions of ‘critical’ scholars and ‘the mainstream’ somehow upside-down, it was ‘the mainstream’ that applauded the new flexibility of the legal argument. At least scholars such as Cassese or Simma did so on a short-term basis. On a long time basis, however, the new flexibility of ‘illegal but legitimacy’ caused also headaches to the mainstream in academia and among international legal practitioners as Kosovo was seen as an exceptional situation of emergency – and as such it was in need of ‘normalization’. Thus, for the mainstream the new task ‘after Kosovo’ should become the request of the IICK, namely to ‘close the gap between legality and legitimacy’ and to make the ‘illegal but legitimate’ ‘legal and legitimate’; or in Cassese’s words: ‘*ex iniuria ius oritur*’.¹⁴⁴¹ What we see here also is an important shift in the temporality of the international legal argument: the question was not only whether Kosovo was ‘illegal but legitimate’, i.e. it was not only an *evaluation* of the past, but also to find new justifications for interventions in the future, i.e. how to legalize interventions in the future in order to anticipate ‘humanitarian catastrophes’.¹⁴⁴² Or, as it was put, to prevent “future Kosovos and

¹⁴⁴⁰ For an argument to politicize the discourse about legality/legitimacy, see Nico Krisch, ‘Review: Legitimacy and Legality in International Law: An Interactional Account. By Jutta Brunnée and Stephen J. Toope’, *American Journal of International Law* 106, no. 1 (2012): 209.

¹⁴⁴¹ Cassese, ‘*Ex Iniuria Ius Oritur*’. Or, as Christopher Daase notes, there is ‘the increasing tendency in international politics to demand the recognition and enforcement of liberal moral norms even at the expense of existing legal norms. It has been argued both explicitly and implicitly that the old system of international law is no longer adequate for an era of emerging threats. A new order is necessary, namely, one that draws on a kind of legitimacy that surmounts the legitimacy of the current legal order’, Daase, ‘Legalizing Legitimacy’, 68.

¹⁴⁴² See already: Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’.

Rwandas”.¹⁴⁴³ In other words, jurisdictional projects become future-oriented. First and foremost it should become, as we will see in the remainder of this chapter, a task within the United Nations to redefine international authority in such a way and thereby relocate the international jurisdiction on interventions back into its own fora. And it was in the context of these different developments that the concept of the responsibility to protect was popularized on an international level.¹⁴⁴⁴

3. The Responsibility to Protect and the New Politics of Intervention: Making the legitimate legal?

In order to better understand how the United Nations, as well as bodies within the United Nations, attempted to redefine international authority in a way that would relocate the international jurisdiction over interventions (back) into its own fora, this section reconstructs how the responsibility to protect became a project within and thereby of the United Nations. I will advance my argument in three steps and outline, first, how the concept of the responsibility to protect emerged in policy debates in the late 1990s (3.1); second, how the International Commission on Intervention and State Sovereignty (ICISS) popularized the concept on an international level (3.2); and, three, how the concept ‘arrived’ at the United Nations and was in this process translated in a specific way, namely through a hybridization with categories from international criminal law (3.3).

3.1 The Politics of Principles: Sovereignty and Human Rights

In September 2000 Canadian Prime Minister Jean Chrétien announced the International Commission on Intervention and State Sovereignty (ICISS) at the Millennium Summit of the United Nations. Thus, in contrast to the IICK, which

¹⁴⁴³ Alex J. Bellamy, ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’, *Ethics & International Affairs* 20, no. 2 (2006): 143.

¹⁴⁴⁴ For a detailed reconstruction of the link between the discourse on humanitarian intervention and the responsibility to protect concept, see Gareth Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’, *Wisconsin International Law Journal* 24, no. 3 (2006): 703–22.

started as a Swedish initiative, the ICISS was initiated as a Canadian project.¹⁴⁴⁵ However, similarly to the IICK, the ICISS was an international expert commission composed of a mix of academics and practitioners. It was co-chaired by Gareth Evans, a former Australian Foreign Minister and president of the Brussels-based NGO 'International Crisis Group', and Mohamed Sahnoun, a former Algerian diplomat and Special Adviser to the UN Secretary-General. Members included, for example, Ramesh Thakur and Michael Ignatieff. The latter was the only member serving in both commissions, the IICK and the ICISS.¹⁴⁴⁶ As for the IICIK, the ICISS's major outcome was a final report, which was published in December 2001. It was here where the concept of the 'responsibility to protect' was introduced to a major public.¹⁴⁴⁷

However, this does not mean that the ICISS started from the scratch. Rather, the ICISS uses in its reports two already on-going discourses as its entry point. First, the Commission links its work directly to the Kosovo report and follows the IICK's suggestion that there is a need to establish a framework for humanitarian interventions. In particular, it was mandated, as one can read at the outset of the report, to discuss a possible "right of humanitarian intervention".¹⁴⁴⁸ In addition, the Commission's "mandate was generally to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty; more specifically, it was to try to develop a global political consensus

¹⁴⁴⁵ According to Jennifer Welsh, Carolin J. Thielking and S. Neil MacFarlane, the ICISS was not only established on initiative of the Canadian government but also its 'thought leadership' as 'a great deal of the Commission's language and concepts reflect the human security agenda that was so prominent a part of Canadian foreign policy in the 1990s', Jennifer Welsh, Carolin J. Thielking, and S. Neil MacFarlane, 'The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty', in *International Commissions and the Power of Ideas*, ed. Ramesh Thakur, Andrew F. Cooper, and John English (Tokyo: United Nations University Press, 2005), 199; see also Christopher Verlage, *Responsibility to Protect* (Tübingen: Mohr Siebeck, 2009), 56–58.

¹⁴⁴⁶ For a complete list of its members see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), 77–79. On the work of the Commission in general see Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009), chap. 2; as well as the evaluation of one of its members, Ramesh Thakur, 'Intervention, Sovereignty, and the Responsibility to Protect', in *International Commissions and the Power of Ideas*, ed. Ramesh Thakur, Andrew F. Cooper, and John English (Tokyo: United Nations University Press, 2005), 180–97.

¹⁴⁴⁷ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*. See also the overview by Welsh, Thielking, and MacFarlane, 'The Responsibility to Protect'.

¹⁴⁴⁸ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, vii.

on how to move from polemics – and often paralysis – towards action within the international system, particularly through the United Nations”.¹⁴⁴⁹ Here, the report implicitly refers to a (rhetorical) question, which was posed by UN Secretary-General Kofi Annan earlier, namely

“if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systemic violations of human rights that affect every precept of our common humanity?”.¹⁴⁵⁰

In this statement Annan links – and this is the second entry point of the report – the debate about humanitarian intervention together with a discourse on the limits and function of (state) sovereignty. Let me address this shortly.

Although, as Luke Glanville notes, the understanding that “the notion of sovereignty entails some particular set of responsibilities is not new” as both “sovereign rights and sovereign responsibilities haven been historically interdependent”,¹⁴⁵¹ it was, however, only after the Cold War and here particularly in the work of Francis M. Deng, Roberta Cohen and their colleagues at the Brookings Institution, a think tank based in Washington DC, that the relationship of sovereignty and responsibility was explicitly problematized.¹⁴⁵² For instance, a monograph by Deng (written together with several co-authors and published in 1996) on conflict management on the African continent attempts to present a “normative framework of sovereignty”, in which it is emphasised that “in order to be legitimate, sovereignty must demonstrate responsibility”.¹⁴⁵³ Moreover, Deng et

¹⁴⁴⁹ International Commission on Intervention and State Sovereignty, 2.

¹⁴⁵⁰ International Commission on Intervention and State Sovereignty, vii, 1. The question is reprinted on the first page of the report. Annan originally brought it forward in his *Millennium Report*, United Nations Secretary-General, ‘We the Peoples: The Role of the United Nations in the Twenty-First Century. Report of the Secretary-General’, A/54/2000 (2000), para. 217 (emphasis in the original).

¹⁴⁵¹ Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (Chicago: The University of Chicago Press, 2014), 9. See also Luke Glanville, ‘The Antecedents of “Sovereignty as Responsibility”’, *European Journal of International Relations* 17, no. 2 (2011): 233–55.

¹⁴⁵² Cf. Francis M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* (Washington: Brookings Institution Press, 1996); and Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of International Displacement* (Washington: Brookings Institution Press, 1998).

¹⁴⁵³ Deng et al., *Sovereignty as Responsibility*, 1, xvii.

al. claim that the concept of sovereignty witnessed a fundamental transformation, which was initiated by the Nuremberg Trial, then further advanced by the human rights movement and championed finally in the 1990s by the idea of humanitarian intervention. This development signified a shift away from the traditional Westphalian notion of sovereignty, where sovereignty is understood as *control*, towards an understanding of sovereignty in terms of *responsibility*.¹⁴⁵⁴ The authors emphasise that both dimensions of sovereignty, the internal and external (or international), are in need of a redefinition from control to responsibility. Deng et al. explain that sovereignty as responsibility “means that national governments are duty bound to ensure minimum standards of security and social welfare for their citizens and be accountable both to the national body politic and the international community”.¹⁴⁵⁵ In this new setting both state and international community should become the new *managers of governance* as “governing is managing conflict”.¹⁴⁵⁶ In turn, the quality of governance can then be evaluated by measuring the effectiveness and capacity of protecting populations from harm. This leads Deng et al. to the conclusion that where “the sovereign state fails to manage conflict effectively and governance breaks down, the responsibility for dealing with disputes may fall for a limited time on external agents” and that those states, which did not meet their responsibilities, “cannot legitimately complain against international humanitarian intervention”.¹⁴⁵⁷

¹⁴⁵⁴ Deng et al., 2–19. As I focus in this paragraph mainly on policy circles and their discussion of the sovereignty/responsibility nexus, I do not address academic debates on sovereignty, which flourished at this time, too. In IR’s mainstream, for instance, Stephen Krasner tried to leave a pure Westphalian model of sovereignty behind by introducing four meanings of sovereignty, namely domestic, interdependence, international legal and Westphalian sovereignty. Although Westphalian sovereignty is (still) important, Krasner includes the three other forms of sovereignty as well, as it helps to get a more comprehensive picture of this notion, Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 9.

¹⁴⁵⁵ Deng et al., *Sovereignty as Responsibility*, 211. In this context in particular human rights play today an important role as they are of ‘transcendental importance as a legitimate are of concern for the international community. This is especially true when order has broken down or the state is incapable or unwilling to act responsibly to protect the masses of citizens. In that action international inaction would be quite indefensible’, Deng et al., 16; see also Cohen and Deng, *Masses in Flight*, 276–278.

¹⁴⁵⁶ Deng et al., *Sovereignty as Responsibility*, 34.

¹⁴⁵⁷ Deng et al., 207, xvi. Similarly: ‘Rather than shield governments and regimes from international scrutiny, sovereignty as a concept of responsibility ensures that basic human rights are respected. When governments fail to meet their obligations [...] they are expected to request outside assistance to help them fulfill their responsibilities [...]. Should they refuse to accept such assistance, the international community can and should assert their concern and step in when the government has failed to discharge its responsibility’, Cohen and Deng, *Masses in Flight*, 276.

In a similar vein the discussion on the limits and function of sovereignty has been taken up by UN General-Secretary Kofi Annan in September 1999, i.e. more than three months after the end of NATO's military intervention in Kosovo.¹⁴⁵⁸ Annan observes in this context that we can find today "two concepts of sovereignty", one vesting in the state and the other in individuals and in the peoples. This signifies for Annan that, on the one hand, "[s]tate sovereignty in its most basic sense, is being redefined" as "[s]tates are now widely understood to be instruments at the service of their peoples, and not vice versa", while, on the other hand, "individual sovereignty" (i.e., "the fundamental freedom of each individual, enshrined on the charter of the UN and subsequent international treaties"), "has been enhanced by a renewed and spreading consciousness of individual rights".¹⁴⁵⁹ The transformation of sovereignty is also manifested in the "developing international norm in favour of intervention to protect civilians from wholesale slaughter".¹⁴⁶⁰ Importantly, Annan claims that in the future one should not have to choose between UN Security Council inaction (like in Rwanda) and a solution by regional organisations circumventing an UN mandate (like in Kosovo) when it comes to the discussion and implementation of such an 'intervention to protect'. Rather, the "UN should be able to find common ground in upholding the principles of the charter, and acting in defence of our common humanity".¹⁴⁶¹ As Annan suggests in his *Millennium Report* presented to the UN General Assembly a few month later, it should be the task of the UN Security Council to find an answer whenever the international community is confronted with conflicting principles:

"But surely no legal principle – not even sovereignty – can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the

¹⁴⁵⁸ Kofi Annan, 'Two Concepts of Sovereignty', *The Economist*, 16 September 1999.

¹⁴⁵⁹ Annan.

¹⁴⁶⁰ Annan.

¹⁴⁶¹ Annan.

option of last resort, but in the face of mass murder it is an option that cannot be relinquished”.¹⁴⁶²

3.2 The International Commission on Intervention and State Sovereignty

Against this background the ICISS final report develops its understanding of the responsibility to protect concept. With the Kosovo debate in mind, the report acknowledges that there is a “critical gap” between legitimacy (“the needs and distress being felt, and seen to be felt, in the real world”) and legality (“the codified instruments and modalities for managing world order”) when it comes to “military intervention for human protection”.¹⁴⁶³ However, the ICISS refuses to close this gap in terms of ‘humanitarian intervention’ or a ‘right to intervene’, as these vocabularies are, due to previous debates “outdated and unhelpful”; it departs therefore from its initial mandate to evaluate an eventual ‘right to humanitarian intervention’.¹⁴⁶⁴

But, why is the language of ‘humanitarian intervention’ or a ‘right to intervene’ according to the ICISS ‘outdated and unhelpful’? On the one hand, the ICISS stresses that the term ‘humanitarian intervention’ has a negative connotation for several humanitarian actors as it involves a “militarization of the word ‘humanitarian’: whatever the motives of those engaging in the intervention, it is anathema for the humanitarian relief and assistance sector to have this word appropriated to describe any kind of military action”.¹⁴⁶⁵ Moreover, the report

¹⁴⁶² United Nations Secretary-General, We the peoples: the role of the United Nations in the twenty-first century. Report of the Secretary-General, para. 219.

¹⁴⁶³ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 15.

¹⁴⁶⁴ International Commission on Intervention and State Sovereignty, 11, 16–18. The turning away from the concept of ‘humanitarian intervention’ is also visible in the name of the commission. Initially, it was planned to call it ‘commission on humanitarian intervention’, which was, however, by endorsing Francis Deng’s position, changed into ‘International Commission on Intervention and State Sovereignty’. See: Bellamy, *Responsibility to Protect*, 36.

¹⁴⁶⁵ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 9. For a view that rejects the term ‘humanitarian intervention’, see for example Anne Ryniker, ‘The ICRC’s Position on “humanitarian Intervention”’, *International Review of the Red Cross* 83, no. 842 (2001): 529; and Jonathan Graubart, ‘War Is Not the Answer: The Responsibility to Protect and Military Intervention’, in *Theorising the Responsibility to Protect*, ed. Ramesh Thakur and William Maley (Cambridge: Cambridge University Press, 2015), 200–219. This relates, of course, also to the by now extensive literature on ‘democratic wars’, the ‘dark side’ of ‘democratic peace’. See, for example, Anna Geis, Harald Müller, and Niklas Schörning, eds., *The Militant Face of Democracy*:

states that “some political quarters” have argued that the term might “prejudge” as it implies that an intervention is based on a just cause even though this might not be the case.¹⁴⁶⁶ And finally, member states from the Non-Aligned Movement were sceptical as it might lead to some kind of “military humanism”, which would justify “arbitrary exercise of power by strong states” instead of protecting vulnerable and weak states and their populations.¹⁴⁶⁷ This scepticism was augmented by the fact that discussions on the ‘right to intervene’ took place mainly in the global North – with British Prime Minister Tony Blair and French Foreign Minister Bernard Koucher as prominent supporters – and were thus perceived as, as co-chair Gareth Evans should describe it later, “inherently one-sided” without “acknowledging the anxieties of those in the global South who had all too often been the beneficiaries of *missions civilisatrices* in the past. That concern was compounded in the French-speaking world, by the fact that *ingérence* conveyed the sense not just of ‘intervention’ but ‘interference’”.¹⁴⁶⁸

On the other hand, the ICISS distances itself from the idea that there might be a ‘right’ to intervene as it is argued that mobilising the language of rights means in this context to give too much attention to the “claims, rights and prerogatives of the potentially intervening state” and to lose sight of “the urgent need of the potential beneficiaries of the action”; it would, furthermore, focus too much on the act of the intervention itself and underestimate its before and after; and, finally, it would imbalance the relationship between intervention and sovereignty as intervention would “trump” sovereignty as it “loads the dice in favour of intervention before the argument has even begun, by tending to label and delegitimize dissent as anti-humanitarian”.¹⁴⁶⁹ This does, however, not mean that

Liberal Forces for Good (Cambridge: Cambridge University Press, 2013); and Anna Geis, Lothar Brock, and Harald Müller, eds., *Democratic Wars: Looking at the Dark Side of Democratic Peace* (Basingstoke: Palgrave Macmillan, 2006).

¹⁴⁶⁶ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 9.

¹⁴⁶⁷ Bellamy, *Responsibility to Protect*, 68.

¹⁴⁶⁸ Gareth J. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington: Brookings Institution Press, 2008), 33.

¹⁴⁶⁹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 16. For the original argument that rights are ‘trumps’ see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977). On the problem that ‘rights’ might ‘trump’ other legal and non-legal figures, but that the discourse of ‘rights’ does not eliminate politics as, first, it remains unclear which right ‘trumps’ in situation of competing rights and, second, nearly everything can be

the Commission abandoned the language of ‘rights’ at all, but rather that it shifts our attention from a “‘right’ of the interveners to the globally acknowledged rights of victims”.¹⁴⁷⁰ Moreover, the language of ‘human rights’ plays a central role in the report and should be a building bloc for the first generation of the responsibility to protect.¹⁴⁷¹ As we will see towards the end of this section, the second generation of the responsibility to protect is rather connected to the vernacular of ‘international crimes’.

Yet for the ICISS, not only the notions of ‘humanitarian intervention’ and a ‘right to intervention’ have become ‘outdated and unhelpful’ but this is also true for our understanding of the concept of *sovereignty* itself. Indeed, a “re-characterization” of the concept of sovereignty is the central aim of the report.¹⁴⁷² For the ICISS, the “Westphalian concept” of sovereignty, which is mirrored by the UN Charter and guarantees “the legal identity of a state in international law” by, on the one hand, externally conceptualising states as “equal, regardless of comparative size and wealthy” (‘sovereign equality’, Article 2(1) of the Charter) and, on the other hand, internally empowering a state “to exercise exclusive and total jurisdiction within its territorial borders” (‘non-intervention’, Article 2(4) of the Charter), is increasingly contested.¹⁴⁷³ It is contested because the international environment is in flux and successively transforming: new actors (e.g., international courts and tribunals as well as NGOs), new security issues (e.g., from inter-state to intra-state conflict) and new discourses such as the ones on human rights, universal jurisdiction and human security produce a demand for a “modern understanding of the meaning of sovereignty”.¹⁴⁷⁴

In order to establish this ‘modern understanding of the meaning of sovereignty’ the ICISS report follows basically UN Secretary-General Kofi Annan’s

translated into the language of rights, see Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014), chap. 7.

¹⁴⁷⁰ Bellamy, *Responsibility to Protect*, 60.

¹⁴⁷¹ See Kirsten Ainley, ‘From Atrocity Crimes to Human Rights: Expanding the Focus of the Responsibility to Protect’, *Global Responsibility to Protect* 9, no. 3 (2017): 243–66.

¹⁴⁷² International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 13.

¹⁴⁷³ International Commission on Intervention and State Sovereignty, 13.

¹⁴⁷⁴ International Commission on Intervention and State Sovereignty, 8, 3–7, 14–16.

“conceptual language of two notions of sovereignty”¹⁴⁷⁵ and complements it with Francis Deng et al.’s idea to link sovereignty with responsibility.¹⁴⁷⁶ As we can read in the ICISS report, sovereignty implies a “dual responsibility”, namely “externally – to respect the sovereignty of other states and internally, to respect the dignity and basic rights of all people within the state”.¹⁴⁷⁷ And elsewhere, echoing again Deng and his co-authors, the report suggests that there is “a necessary re-characterization involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties”.¹⁴⁷⁸ Hence, this ‘re-characterization’ attempts to shift the focus from a ‘right to intervene’, which is attributed to outsiders, to the protection of those suffering from violence. For the ICISS, states remain – at least formally – the main actors as they are entrusted with the primary responsibility to protect their population from serious harm and to the “promotion of their welfare”; yet, states are not only responsible to their citizens but also to “the international community represented by the UN”; and finally, “agents of state” in case of failing to fulfil their responsibility are personally “responsible for their action”.¹⁴⁷⁹ Importantly, however, not only those in charge become accountable in case of failure, as when a state in question is “unwilling or unable” to fulfil its responsibility “or is itself the perpetrator”, it “becomes the responsibility of the international community to act in its place”.¹⁴⁸⁰

In other words the ICISS claims that in such a case a state’s sovereignty is suspended and transferred to the international community. However, “the suspension of sovereignty is only *de facto* for the period of the intervention and follow-up, and not *de jure*.”¹⁴⁸¹ It is in the context of this discussion, where a new notion, namely the notion of *risk*, enters the debate, as the “substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at *risk*”.¹⁴⁸² I will discuss towards the end of this chapter

¹⁴⁷⁵ International Commission on Intervention and State Sovereignty, 13; see Annan, ‘Two Concepts of Sovereignty’.

¹⁴⁷⁶ Deng et al., *Sovereignty as Responsibility*.

¹⁴⁷⁷ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 8.

¹⁴⁷⁸ International Commission on Intervention and State Sovereignty, 13 (emphasis in the original).

¹⁴⁷⁹ International Commission on Intervention and State Sovereignty, 13, xi.

¹⁴⁸⁰ International Commission on Intervention and State Sovereignty, 17, xi.

¹⁴⁸¹ International Commission on Intervention and State Sovereignty, 44.

¹⁴⁸² International Commission on Intervention and State Sovereignty, 17 (emphasis added).

what this turn to 'risk' could signify for the discourse of 'humanity's law'. But let me first turn to two other points of the report: the division of the responsibility to protect into three elements and the question of authority.

In order to get a better grip on the responsibility to protect and to consider the concept in all its bearings, the ICISS suggests that it should unfold into three "elements", "techniques" or "integral and essential components", namely "not just the responsibility to *react* to an actual or apprehended human catastrophe, but the responsibility to *prevent* it, and the responsibility to *rebuild* after the event".¹⁴⁸³ By including the responsibility to prevent and the responsibility to rebuild, the ICISS attempts to move beyond the notion of humanitarian intervention and its focus on the very act of intervention. In this respect the responsibility to react should include early warning mechanisms, which should be centralized at the UN headquarters, as well as a "direct prevention 'toolbox'" including political and diplomatic (under the auspices of the UN Secretary-General), economic (supported by the World Bank), legal (including the International Criminal Court) and military (with UN peace-keeping forces) prevention measures.¹⁴⁸⁴ By acknowledging this, the report hopes to change the international community's "basic mindset from a 'culture of reaction' to that of a 'culture of prevention'".¹⁴⁸⁵

On the other side, the ICISS's responsibility to protect concept draws also on the idea of a responsibility to rebuild. Here again, the report stresses the relevance of mixed measures, including military (e.g., disarmament, demobilization and reintegration of local security forces), legal (e.g., building a functioning judicial system) and economic (e.g., development policy) initiatives. The report admits that these measures might be implemented through a trusteeship system governed by the United Nations. Although such a system might be contested, as it represents an

¹⁴⁸³ International Commission on Intervention and State Sovereignty, 17 (emphasis in the original).

¹⁴⁸⁴ International Commission on Intervention and State Sovereignty, 23, 19–27. Here, the report follows basically the recommendations of the Carnegie Commission on Preventing Deadly Conflict, see Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report* (New York: Carnegie Cooperation of New York, 1997).

¹⁴⁸⁵ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 27.

inference into the internal sovereignty of a state, it is nevertheless considered as 'better' solution compared to the scenario of a 'failed state'.¹⁴⁸⁶

Although both the responsibility to prevent and the responsibility to rebuild are given a prominent place in the report, it is (still) the responsibility to react, i.e. the focus on military intervention for humanitarian purposes, which plays the major role. The ICISS report focuses on two issues with regard to the responsibility to react. *On the one hand*, it tries to identify "threshold criteria" in order to identify the "just cause" of a military intervention. 'Just causes' are, firstly, as it is stated, "*large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation*" or, secondly, "*large scale 'ethnic cleansing', actual or apprehended*".¹⁴⁸⁷ Human rights violations, which do neither include large-scale killings nor 'ethnic cleansing', as well as a lack of democracy or a rescue mission of own nationals from foreign territory are considered of not being 'just causes'.¹⁴⁸⁸ *On the other hand*, the report lists a number of "precautionary criteria" such as right intention, last resort or proportional measures, which should help to operationalize military interventions and for instance guarantee the prevention of large-scale casualties among the civilian population during the act of intervention.¹⁴⁸⁹

Although the split-up of the responsibility to protect into a responsibility to prevent, to react and to protect might sound like a temporal continuum or sequence of a 'before', 'during' and 'after' of an intervention, Orford suggests, that

¹⁴⁸⁶ International Commission on Intervention and State Sovereignty, 39–43.

¹⁴⁸⁷ International Commission on Intervention and State Sovereignty, 32 (emphasis in the original). However, the report does not further specify or even 'quantify' what it means by 'large scale'. See critically: Welsh, Thielking, and MacFarlane, 'The Responsibility to Protect', 204–205.

¹⁴⁸⁸ This is an important transformation of 'just causes' when compared to debates even in the mid-1990s, where rescue missions were considered together with interventions based on a UN Security Council authorization as the only legal and legitimate forms of humanitarian intervention. This argument is advanced, e.g., by Friedrich Kratochwil, 'Sovereignty as "Dominium": Is There a Right to Humanitarian Intervention?', in *Beyond Westphalia? National Sovereignty and International Intervention*, ed. Michael Mastanduno and Gene Lyons (Baltimore: John Hopkins University Press, 1995), 36–37.

¹⁴⁸⁹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 32, 35–37, 57–67. The notion of 'just causes' derives of course from the just war tradition. For a discussion of the relationship of the responsibility to protect concept and the just war tradition see Alex J. Bellamy, 'The Responsibility to Protect and the Just War Tradition', in *Theorising the Responsibility to Protect*, ed. Ramesh Thakur and William Maley (Cambridge: Cambridge University Press, 2015), 181–99.

the different dimensions of the responsibility to protect are “in fact better understood as a way of thinking about groups of techniques – techniques of prevention such as surveillance, techniques for reaction such as the use of force and techniques for rebuilding such as administration, security sector reform and economic development”.¹⁴⁹⁰ These different techniques are in turn ‘manageable’ by and through the various actors and experts within and around the United Nations.

Finally and connected to these techniques, the ICISS addresses the question of *authority*, in particular the authority to represent and act in the name of the international community. While, as we have seen above, debates in the immediate aftermath of NATO’s Kosovo action in 1999 allocated authority with the Alliance and the intervening states by claiming the ‘legitimacy’ of the intervention, the ICISS report relocates this authority with the United Nations as it states that the United Nations “is unquestionably the principle institution for building, consolidating and using the authority of the international community”.¹⁴⁹¹ By implicitly referring to the question of the legitimacy of the Kosovo military intervention, the report continues to explain that the “authority of the UN is underpinned not by coercive power, but by its role as the applicator of *legitimacy*. *The concept of legitimacy acts as the connecting link between the exercise of authority and the recourse to power*. [...] Collective intervention blessed by the UN is regarded as legitimate because it is authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested”.¹⁴⁹²

For the ICISS, the *legitimacy* and *authority* of the United Nations is, firstly, established by the fact that the United Nations can balance between realism and idealism as it “exists in a world of sovereign states, and its operations must be based in political realism. But the organization is also the repository of international idealism, and that sense is fundamental to its identity”.¹⁴⁹³ It is, secondly, grounded in the idea that the United Nations is the “centre for

¹⁴⁹⁰ Orford, *International Authority and the Responsibility to Protect*, 103.

¹⁴⁹¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 48.

¹⁴⁹² International Commission on Intervention and State Sovereignty, 48 (emphasis added).

¹⁴⁹³ International Commission on Intervention and State Sovereignty, 52.

harmonizing national interests and forging international interests”.¹⁴⁹⁴ And, finally, the United Nations has the capacity to do so because of its “comparative advantages” as it assembles “universal membership, political legitimacy, administrative impartiality, technical expertise, convening and mobilizing power, and dedication of its staff”.¹⁴⁹⁵

While the ICISS clearly recommends the United Nations as the centre of international authority when it comes to the responsibility to protect, it is not clear *where* exactly this authority should be located *within* the United Nations system. With regard to this question, the report suggests that the *UN Security Council* should become pivotal, having a special “role – and responsibility”, as if “international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that the central role of the Security Council will have to be at the heart of that consensus”.¹⁴⁹⁶ Making the Security Council the vanguard of the responsibility to protect implies for the Commission, on the one hand, that an authorization by the Security Council must be sought prior to any military intervention but, on the other hand, also that the Security Council “should deal promptly” if there is a “request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing”.¹⁴⁹⁷ However, if there are situations of institutional deadlock among the Permanent Five the ICISS suggests that, in order to remain effective, the Permanent Five, should agree in advance upon a “‘code of conduct’ for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis”.¹⁴⁹⁸ If the Security Council would still fail to act, the report considers that the authority to take actions with regard to the responsibility to protect might fall either to the General Assembly, which “would provide a high degree of legitimacy for an intervention”, or – “within its defining boundaries” (i.e. membership and not ‘out of area’) – to regional or sub-regional organisations because of their expertise and embeddedness within their respective region.¹⁴⁹⁹ In the latter case, interventions of regional organizations against non-members are

¹⁴⁹⁴ International Commission on Intervention and State Sovereignty, 52.

¹⁴⁹⁵ International Commission on Intervention and State Sovereignty, 52.

¹⁴⁹⁶ International Commission on Intervention and State Sovereignty, 49.

¹⁴⁹⁷ International Commission on Intervention and State Sovereignty, 50.

¹⁴⁹⁸ International Commission on Intervention and State Sovereignty, 51.

¹⁴⁹⁹ International Commission on Intervention and State Sovereignty, 53.

for the ICISS at least “controversial”.¹⁵⁰⁰ Thus – and in order to sum up – by introducing the responsibility to protect concept the ICISS attempts to transfer the authority and hence the jurisdiction to decide in the name of the international community (back) to the United Nations.

3.3 The United Nations and the Responsibility to Protect: The Hybridization of the Intervention Discourse and International Criminal Law

After the publication of the ICISS report the responsibility to protect was increasingly discussed by and within the different bodies of the United Nations. Obviously, the United Nations – and particularly Secretary-General Kofi Annan – saw the debate about the responsibility as a welcomed opportunity to further (re)gain international authority and jurisdiction over questions of international interventions.¹⁵⁰¹ This transformed arguments about the responsibility to protect in an important way: where discussions about the responsibility to protect in the context of the ICISS were mostly characterized by *moral* narratives, the story after the ICISS report increasingly became an *intergovernmental* one as the main question was now how to gain the support of UN member states to endorse the responsibility to protect.

As a first step in this regard Secretary-General Annan assembled in 2003 a group of sixteen distinguished international experts in order to form a ‘High-level panel on Threats, Challenges and Change’.¹⁵⁰² As with the ICISS commission, the former Australian Foreign Minister Gareth Evans became a co-chair – an

¹⁵⁰⁰ International Commission on Intervention and State Sovereignty, 54.

¹⁵⁰¹ From early onwards and besides the United Nations, the responsibility to protect concept played also an important role for the African Union (AU), which was established in 2002. While its predecessors the Organization of African Unity (OAU) equated sovereignty with ‘non-interference’, the AU started to emphasise ‘non-indifference’. See, e.g. Paul D. Williams, ‘From Non-Intervention to Non-Indifference: The Origins and Development of the African Union’s Security Culture’, *African Affairs* 106, no. 423 (2007): 253–79; Bellamy, *Responsibility to Protect*, 77–81; and Evans, *The Responsibility to Protect*, 45.

¹⁵⁰² The idea to establish this panel goes back to Annan’s general plan to reform the UN and here, in particular, the second reform report, which was drafted by Ramesh Thakur, United Nations Secretary-General, ‘Strengthening of the United Nations: An Agenda for Further Change’, A/57/387 (2002). For a discussion of the work of the high-level panel, see Ramesh Thakur, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics* (Abingdon: Routledge, 2010), chap. 7.

appointment that highlights the continuity between the two expert groups.¹⁵⁰³ The panel foregrounded in its final report, which was published in 2004, the relevance of the responsibility to protect concept. This becomes already visible in the report's title *A More Secure World: Our Shared Responsibility*.¹⁵⁰⁴ In a nutshell, *A More Secure World* acknowledges that the "maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both *legal and legitimate*".¹⁵⁰⁵ In this regard the report follows the Kosovo Commission's observation of a 'gap between legality and legitimacy', which needs to be addressed and closed, and connects this with the claim of the ICISS that the "successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of Sovereign governments but on their *responsibilities*, both to their own people as to the wider international community".¹⁵⁰⁶ In other words, the panel follows the ICISS's project of a 're-characterization' of sovereignty and stresses that the "principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing".¹⁵⁰⁷

What is important for our discussion in the remainder of this chapter, is that *A More Secure World* attempts to broaden and clarify the 'just cause' criteria of the ICISS report by adding 'serious violations of international humanitarian law' and by introducing the language of 'atrocities' – and connected to this: of genocide, ethnic cleansing and large-scale killing.¹⁵⁰⁸ I will elaborate on the consequences of this shift later in this chapter. On a more general note, the panel agrees with the ICISS when it comes to discuss the relationship between a 'right to intervene' and the 'responsibility to protect, when it writes, that there

¹⁵⁰³ Verlage, *Responsibility to Protect*, 3.

¹⁵⁰⁴ United Nations High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations Press, 2004).

¹⁵⁰⁵ United Nations High-level Panel on Threats, Challenges, and Change, para. 184 (emphasis added).

¹⁵⁰⁶ United Nations High-level Panel on Threats, Challenges, and Change, 201 (emphasis added).

¹⁵⁰⁷ United Nations High-level Panel on Threats, Challenges, and Change, 200.

¹⁵⁰⁸ Cf. Bellamy, *Responsibility to Protect*, 75.

“is a growing recognition that the issue is not the ‘right to intervene’ of any State, but the ‘responsibility to protect’ of *every* State when it comes to people suffering from avoidable catastrophe [...]. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community - with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies”.¹⁵⁰⁹

The high-panel report *A More Secure World* served Secretary-General Annan as important groundwork for his report ‘In larger freedom: towards development, security and human rights for all’, which was published in March 2005 with the intention, on the one hand, to evaluate the outcome of the Millennium Summit five years earlier and, on the other hand, to prepare the World Summit a few month later. *In this report the vernacular of responsibility is fully internalised, as there seems to be a ‘responsibility for everything’.* For instance, it is claimed that states with nuclear weapons have “a unique responsibility”;¹⁵¹⁰ similarly each “developing country has primary responsibility for its own development”;¹⁵¹¹ or the international community has “responsibility for mitigating climate change”¹⁵¹² as well as there is a “responsibility to respect the law”;¹⁵¹³ and, finally, there is a “responsibilities to turn good words into good deeds”.¹⁵¹⁴ When it comes to security issues, Secretary-General Annan basically follows the high-level panel’s position and writes that “I believe to embrace the responsibility to protect and, when necessary, we must act on it”.¹⁵¹⁵ Annan also follows the ‘High-level panel on Threats, Challenges and Change’ by introducing ‘just cause’ criteria in the form of concepts from the discourse of international criminal law (namely genocide, ethnic cleansing and crimes against humanity) as triggers for the responsibility to

¹⁵⁰⁹ United Nations High-level Panel on Threats, Challenges, and Change, *A More Secure World*, 201.

¹⁵¹⁰ United Nations Secretary-General, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (2005), 28.

¹⁵¹¹ United Nations Secretary-General, 12.

¹⁵¹² United Nations Secretary-General, 20.

¹⁵¹³ United Nations Secretary-General, 31.

¹⁵¹⁴ United Nations Secretary-General, 7.

¹⁵¹⁵ United Nations Secretary-General, 35.

protect. Accordingly, Annan urges from state representatives that they should

“embrace the ‘responsibility to protect’ as a basis for collective action against genocide, ethnic cleansing and crimes against humanity, and agree to act on this responsibility, recognizing that this responsibility lies first and foremost with each individual State, whose duty it is to protect its population, but that if national authorities are unwilling or unable to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect civilian populations, and that if such methods appear insufficient the Security Council may out of necessity decide to take action under the Charter, including enforcement action, if so required”.¹⁵¹⁶

The work of Secretary-General Annan and the ‘High-level panel on Threats, Challenges and Change’ has been crucial in adding the responsibility to protect to the agenda of the General Assembly’s World Summit in October 2005, where the United Nations celebrated its sixtieth anniversary and which should become the largest assembly of heads of states in its history.¹⁵¹⁷ Among the results of the World Summit was that the Head of States and Governments unanimously adopted the responsibility to protect.¹⁵¹⁸ The responsibility to protect takes up a rather lengthy passage in the Outcome Document.¹⁵¹⁹ The three paragraphs dedicated to the responsibility to protect state the following:

“138. Each individual State has the responsibility to protect its

¹⁵¹⁶ United Nations Secretary-General, 59.

¹⁵¹⁷ Bellamy, *Responsibility to Protect*, 76.

¹⁵¹⁸ For a discussion whether this was actually a ‘success’ or ‘just’ the endorsement of a ‘R2P lite’ as the ‘basic principle divested of almost all its substance’, see Bellamy, chap. 5. Gareth Evans, however, emphasises the continuity: ‘The language of the relevant paragraphs, 138 and 139, of the Outcome Document differs a little from all the previous formulations in the ICISS, High-Level Panel, and secretary-general’s reports, but it does not vary from core R2P principles in any significant way - despite the disposition of some commentators to argue otherwise’. This brings Evans to the conclusion that the ‘unanimous agreement on this language at the World Summit was an enormous achievement’, Evans, *The Responsibility to Protect*, 47.

¹⁵¹⁹ United Nations General Assembly, ‘2005 World Summit Outcome’, A/RES/60/1 (2005), para. 138–140. For an overview of the complex and complicated negotiation process on the responsibility to protect during the preparation of the World Summit see Ekkehard Strauss, *The Emperor’s New Clothes? The United Nations and the Implementation of the Responsibility to Protect* (Baden-Baden: Nomos, 2009), 11–18.

populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of genocide".¹⁵²⁰

Furthermore, in 2006 the UN Security Council reaffirmed the provisions of paragraphs 138 and 139 in its resolution 1674 by explicitly referring to the

¹⁵²⁰ United Nations General Assembly, 2005 World Summit Outcome, para. 138–139.

“responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.¹⁵²¹

In the context of the World Summit Outcome Document four points are important to emphasise for the purpose of this chapter. First, it delegates the authority and jurisdiction over the responsibility to protect to the United Nations as the United Nations presents the (previously often amorphously conceptualised) ‘international community’. In addition, the document links the central role of the United Nations explicitly to the Charter and foregrounds the role of the UN Security Council to take up a coordinative ‘collective action’ and to authorize the use of force if necessary.¹⁵²² Although regional organisations should be included as cooperation partners, the Security Council stands clearly above these institutions.¹⁵²³ A humanitarian intervention such as conducted for example by NATO in its unilateral air operation in Kosovo is not intended in this framework anymore. This means that the World Summit Outcome Document resembles in this aspect the position of the ICISS.

Second, as it was the case already with the high-level panel’s report and Secretary-General Annan’s ‘In larger freedom’ speech, the claim of the ICISS that the ‘substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk’¹⁵²⁴ is further clarified and broadened by the introduction of the core international crimes of genocide, war crimes, ethnic cleansing and crimes against humanity. Although the issue of *protection* has been around for some time in international relations, in particular in the context of the United Nations, and although it is obviously central for the responsibility to *protect* concept, it was not clear what ‘protection’ actually means and subsequently how it can be operationalized and ‘put into practice’.¹⁵²⁵ While

¹⁵²¹ United Nations Security Council, ‘Resolution 1674’, S/RES/1674 (2006), para. 4.

¹⁵²² Cf. Evans, *The Responsibility to Protect*, 132.

¹⁵²³ This stands also in a broader development that has been characterized as constitutionalisation under the UN Security Council. For a discussion of this constitutionalisation in the context of the ‘war on terror’ see Jean L. Cohen, ‘A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach’, *Constellations* 15, no. 4 (2008): 456–84.

¹⁵²⁴ See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 17 and my discussion above in this chapter.

¹⁵²⁵ For a genealogy of the ‘protection of civilians’ paradigm in international relations, see Arthur Mühlen-Schulte, ‘Evolving Discourses of Protection’, in *The Protection of Civilians in UN Peacekeeping: Concept, Implementation and Practice*, ed. Benjamin de Carvalho and Ole Jacob

most scholars and practitioners would agree that the meaning of the concept of protection changed from the interstate wars of the early twentieth century, with rather military than civilian casualties, to the intrastate conflicts at the end of the same century, with mainly civilian casualties, the concept is nevertheless considered as ‘blurred’ or ‘unclear’ and it is pointed out moreover that it is without a ‘formal’ definition within the United Nations.¹⁵²⁶ In order to circumvent conceptual quagmires and competing definitions, Kofi Annan introduced the notion of a “culture of protection” in the early 2000s.¹⁵²⁷ On the one hand, to speak of a ‘culture of protection’ might help to hold within and around the United Nations the “vast divergence of organizational cultures, mandates and intuitional trajectories among actors conducting protection activities” together and to create the basis for a protection project of a larger movement;¹⁵²⁸ but, on the other hand, it makes it difficult to ‘turn protection into practice’ and to ‘translate it to the ground’. To frame the issue of protection in the context of the responsibility to protect in terms of the international crimes of genocide, war crimes, ethnic cleansing and crimes against humanity presents thus an attempt to overcome the indeterminacy of the ‘culture of protection’ concept.

Third and connected to this, as protection is tied to genocide, war crimes, ethnic cleansing and crimes against humanity we can observe a *hybridization* of two central discourses of ‘humanity’s law’, namely international criminal law and international humanitarian law.¹⁵²⁹ Put differently, *where earlier academic and*

Sending (Baden-Baden: Nomos, 2013), 25–46. Jon Harald Sande Lie and Benjamin de Carvalho find in the context of the United Nations two distinct discourses with the notion of protection at its centre: one on the ‘protection of civilians’ and the other on the ‘responsibility to protect’, Jon Harald Sande Lie and Benjamin de Carvalho, ‘Conceptual Uncertainty and Competition: The Protection of Civilians and the Responsibility to Protect’, in *The Protection of Civilians in UN Peacekeeping: Concept, Implementation and Practice*, ed. Benjamin de Carvalho and Ole Jacob Sending (Baden-Baden: Nomos, 2013), 47–61. Anne Orford in contrast does not distinguish between both and presents instead a genealogy of only one discourse of protection within the United Nations, see Orford, *International Authority and the Responsibility to Protect*.

¹⁵²⁶ Lie and de Carvalho, ‘Conceptual Uncertainty and Competition’, 53. According to Lie and de Carvalho, conceptual uncertainty was further aggravated in some literatures by merging the protection of civilians (PoC) and the responsibility to protect (R2P). They insist that ‘being non-interventionist, PoC enjoys wider legitimacy than R2P. The conceptual muddle resulting from the use of the two concepts as synonymous can easily end up in jeopardizing the legitimacy of PoC. It is essential to treat R2P and PoC as two *distinct* but *related* concepts in order to avoid “R2PoC”’, Lie and de Carvalho, 61 (emphasis in the original).

¹⁵²⁷ United Nations Secretary-General, ‘Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict’, S/2001/331 (2001).

¹⁵²⁸ Lie and de Carvalho, ‘Conceptual Uncertainty and Competition’, 58.

¹⁵²⁹ Cf. Mégret, ‘ICC, R2P, and the International Community’s Evolving Interventionist Toolkit’, 25.

*non-academic discussions in the context of 'humanitarian interventions' and still with regard to the ICISS report framed the issue of 'protection' – and, thus, based the source of 'humanity' – rather in the vernacular of (international) human rights (law), we witness now a discursive shift towards the language of international crimes.*¹⁵³⁰ The international crimes of the World Summit Outcome Document resemble to a large extent also the catalogue of crimes of the Rome Statute of the International Criminal Court.¹⁵³¹ Both include genocide, war crimes and crimes against humanity and differ with respect to the fourth category of crimes: while the Rome Statute includes the crime of aggression, the World Summit Outcome Document lists ethnic cleansing as distinct crime. As Frédéric Mégret describes the overall rationale, these “crimes must be prevented as a matter of urgent moral and legal obligation, and both R2P and the ICC are means of towards that end. As practices of power one might say that their specificity lies in their being technologies of ‘designations of victims’, by which is meant ‘legitimate’ victims”.¹⁵³² In a similar vein Anne Orford notes an “expanded role of international criminal law categories in international governance. The risk of international crimes taking place is now posited as the trigger to a broad range of governance and police functions. The jurisdiction of the international community will be triggered by the risk that certain specific crimes may be committed”.¹⁵³³ This goes, of course, also hand in hand with the observation of the previous chapter that ‘humanity’s Law’ is not restricted to expand its jurisdiction by relying on a territorial logic of jurisdiction but that it is able to conceptualise space differently by, e.g., relying on an extension of its jurisdiction *ratione materiae*.

Fourth, the central questions are now of *who defines, frames and decides over the ‘risk’ that certain crimes might happen in the (immediate) future; of who is*

¹⁵³⁰ For critical discussion see Ainley, ‘From Atrocity Crimes to Human Rights’.

¹⁵³¹ See, for example, Tarun Chhabra and Jeremy B. Zucker, ‘Defining the Crimes’, in *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time*, ed. Jared Genser and Irwin Cotler (Oxford: Oxford University Press, 2012), 37. On the politics of crimes in the wider context of the International Criminal Court see also my discussion in Chapter 6. It is important to note that the World Summit Outcome Document is not the first instance that connects international crimes and interventionism. In a similar vein the Constitutive Act of the African Union had defined international crimes as ‘triggers’ for regional interventions. Cf. Orford, *International Authority and the Responsibility to Protect*, 185.

¹⁵³² Mégret, ‘ICC, R2P, and the International Community’s Evolving Interventionist Toolkit’, 25.

¹⁵³³ Orford, *International Authority and the Responsibility to Protect*, 185. See also Mégret, ‘ICC, R2P, and the International Community’s Evolving Interventionist Toolkit’, 26.

able to speak and of who is silenced; of what is known and what is unknown. This is of course also part of a larger ‘politics of catastrophe’ and ‘imagination’.¹⁵³⁴ What I will claim in the remainder of this chapter is that we can observe a jurisdictional struggle over the responsibility to protect *within the United Nations and here particularly between the UN Security Council and the position of the UN Secretary General itself* as the UN Secretary-General – first Kofi Annan and from 2007 onwards Ban Ki-moon – attempted to gain the epistemic authority over the question of whether a ‘population is at risk’ or not by locating specific expertise within the bureaucracy of the United Nations. Hand-in-hand with this goes also a transformation of the focus of the responsibility to protect discourse. While the narrative in the context of the World Summit was first and foremost an *intergovernmental* one, we can now observe a more technical and operational language about the *implementation* of the responsibility to protect within the United Nations.

4. Risky Interventions: Quantifying Humanity’s Law and the Production of Temporal Uncertainty

In the remainder of this chapter, I will concentrate on a specific episode of the implementation of the responsibility to protect within the United Nations, namely the attempt to translate the responsibility to protect into an indicator of a risk assessment tool. By doing so, I will be able to illustrate how the Secretary-General, first Kofi Annan and then Ban Ki-moon, was able to gain discursive hegemony within the United Nations as well as outside of it by making the responsibility to protect a technical project conducted by different experts and through various kinds of expertise (4.1). In particular, I will reconstruct how legal categories, in this case international crimes, were translated into risk indicators (4.2). This helps me then to reflect about the effects of quantification, the shifting of temporality within the international legal discourse and changes in international authority and jurisdiction when it comes to questions of intervention. I will link this finally to a discussion about the temporality of the humanity concept itself (4.3).

¹⁵³⁴ For a discussion of these terms see Claudia Aradau and Rens van Munster, *Politics of Catastrophe: Genealogies of the Unknown* (London: Routledge, 2011).

4.1 'Materializing', 'Implementing', 'Mainstreaming', 'Operationalizing'

As we have seen in the previous section, it was under the tenure of Kofi Annan as Secretary-General that the responsibility to protect was introduced into the United Nations system and started to play an increasingly important role in particular after its unanimous endorsement in the context the of the 2005 World Summit.¹⁵³⁵ Annan's successor as Secretary-General, Ban Ki-moon, should further develop the project of the responsibility and focus mainly on its implementation. As Ban stated already in his appointment speech in front of the General Assembly in October 2006:

"As Secretary-General, I will make the most of the authority invested in my office by the Charter and the mandate you give me. *I will work diligently to materialize our responsibility to protect the most vulnerable members of humanity* and for the peaceful resolution of threats to international security and regional stability".¹⁵³⁶

In order to 'materialize' the responsibility to protect – or, as he should put it in his programmatic speech in Berlin in July 2008 to "turn promise into practice, words into deeds"¹⁵³⁷ – Ban should rely on two interrelated instruments. These instruments have also to be understood as forms of 'capacity building' on an international level.¹⁵³⁸ Firstly, Ban appointed special advisers and, secondly, he should issue a yearly report on the 'implementation' of the responsibility to protect. Here, the language of 'implementation' should indicate that the main

¹⁵³⁵ Indeed, Annan himself saw the endorsement of the responsibility to protect at the World Summit as a major achievement of his tenure as Secretary-General. Asked at his final press conference as Secretary-General about his major achievements, Annan answered: 'I would say the work we did on human rights and the approval of the responsibility to protect, by the Member States. [...] Let me say that that new principle, which is an extremely important one, will make a difference, I believe, in our world. But, we should not expect it to be fulfilled or implemented immediately or in the first year. I think, over time, you will see what difference this is going to make to international law', United Nations, 'Transcript of Press Conference by Secretary General Kofi Annan at United Nations Headquarters', 19 December 2006.

¹⁵³⁶ United Nations, 'Ban Ki-Moon Appointed next UN Secretary-General by Acclamation', 13 October 2006.

¹⁵³⁷ And Ban continues: 'Today, the responsibility to protect is a concept, not yet a policy; an aspiration, not yet a reality', Ban Ki-moon, 'Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on "Responsible Sovereignty: International Cooperation for a Changed World"', 15 July 2008.

¹⁵³⁸ For a discussion see, for example, Welsh, 'Implementing the "Responsibility to Protect"', 140–143.

political struggle over the responsibility to protect was over and that the United Nations, represented by the Secretary-General, has international authority and jurisdiction over questions of intervention and the use of force in general. Let me briefly turn to both instruments.

As a first instrument, and reflecting paragraph 140 of the World Summit Outcome Document, two *special advisers* should start to occupy important positions. A Special Adviser on the Prevention of Genocide was appointed in 2004 already, with Juan Méndez serving as first in this function. The initial list of the main responsibilities of this special adviser included to “collect existing information, [...] act as a mechanism of early warning to the Secretary-General, [...], make recommendations to the Security Council [and] liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations capacity to analyse and manage information relating to genocide or related crimes”.¹⁵³⁹ In May 2007 Francis Deng, who had coined the term ‘responsibility to protect’ some ten years earlier, succeed Juan Méndez as Special Adviser. Institutionally, the position was also enhanced at this time by making it full-time and upgrading it to the level of Under-Secretary-General and, content-wise, the mandate was altered as the position was renamed into Special Adviser for the Prevention of Genocide and Mass Atrocities. The idea behind adding ‘mass atrocities’ was to broaden the scope of the mandate “without determining whether a specific situation has a ‘genocidal’ character or not”.¹⁵⁴⁰ In addition, Secretary-General Ban Ki-moon established, after a difficult negotiation process with the General Assembly, the post of another special adviser, namely the Special Adviser on the Responsibility to Protect, which should be covered on a part-time basis at Assistant Secretary-General level and which was first occupied by Edward C. Luck,¹⁵⁴¹ a – in the words of Ban – “distinguished international

¹⁵³⁹ United Nations Security Council, ‘Outline of the Mandate for the Special Adviser on the Prevention of Genocide’, S/2004/567 (2004), 2.

¹⁵⁴⁰ United Nations Secretary-General, ‘Letter Dated 31 August 2007 from the Secretary-General Addressed to the President of the Security Council’, S/2007/721 (2007), 1.

¹⁵⁴¹ The negotiation process was difficult as the representatives of Cuba, Egypt, India, Iran and Pakistan rejected the first proposal to appoint a Special Adviser on the Responsibility to Protect as they feared that the General Assembly would transfer too much power to the Secretary-General. See Strauss, *The Emperor’s New Clothes?*, 43. And the position should remain contested within the United Nations in the years that came. Reflecting retrospectively about his role as special adviser, Luck writes: ‘This author [Edward C. Luck] recalls talk of or attempts by three or four larger UN entities to absorb the Joint Office on Genocide Prevention and R2P during the five years he served

scholar with extensive knowledge of the United Nations system and a superb reputation for academic and practical excellence”.¹⁵⁴² The Special Adviser on the Responsibility to Protect should “work on the conceptual, institutional and political dimension” of the responsibility to protect¹⁵⁴³ and help “to operationalize the concept and to develop the doctrine of the responsibility to protect”.¹⁵⁴⁴ Moreover, both special advisers – to whom Ban should refer also as “my two professors” – started to share a “joint office” (‘Office on Genocide Prevention and the Responsibility to Protect’) in New York in order to “help [...] the United Nations to speak and act as one” when it comes to the responsibility to protect and the question of international crimes.¹⁵⁴⁵ The “primary function” of the Office on Genocide Prevention and the Responsibility to Protect encompasses mainly to “collect, collate, analyse, and disseminate information”.¹⁵⁴⁶

As a second instrument to translate the responsibility to protect into the United Nations system, Secretary-General Ban started to present from 2009 onwards yearly *implementation reports* on the responsibility to protect before the General Assembly. Although the Security Council has been added as second addressee of the reports in 2011, it is clearly visible in these reports that the General Assembly rather than the Security Council is seen as the main site for

as Special Adviser. Some couched this as a possible reform measure to be taken in the name of streamlining and coherence. Such a step, however, would reduce the range of views presented to the Secretary-General and, in some cases, to the Member States. It could also discourage the kind of fresh thinking and targeted approaches that are most needed in the relatively underdeveloped field of study of atrocity prevention as a distinct policy challenge that requires distinct policy responses’, Edward C. Luck, ‘Getting There, Being Better: The Dual Roles of the Special Adviser’, in *The Oxford Handbook of the Responsibility to Protect*, ed. Alex J. Bellamy and Tim Dunne (Oxford: Oxford University Press, 2016), 298–299. In other words, the establishment of the positions of special advisers serves as perfect example for inner-organizational rivalries within the United Nations and how different groups attempt to gain jurisdiction over the working areas of the two special advisers.

¹⁵⁴² United Nations Secretary-General, Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council; Don Hubert, ‘The Responsibility to Protect: Preventing and Halting Crimes Against Humanity’, in *Mass Atrocity Crimes: Preventing Future Outrages*, ed. Rotberg Robert I. (Washington: Brookings Institution Press, 2010), 99; see also Edward C. Luck, ‘Getting There, Being There: The Dual Role of the Special Adviser’, in *The Oxford Handbook of the Responsibility to Protect*, ed. Alex J. Bellamy and Tim Dunne (Oxford: Oxford University Press, 2016), 288–314.

¹⁵⁴³ Ban, ‘Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event’.

¹⁵⁴⁴ United Nations Secretary-General, ‘Proposed Programme Budget for the Biennium 2008-2009’, A/62/512/Add.1 (2007), para. 31.

¹⁵⁴⁵ Ban, ‘Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event’.

¹⁵⁴⁶ Welsh, ‘Implementing the “Responsibility to Protect”’, 142.

debates with regard to the responsibility to protect.¹⁵⁴⁷ Without going into the details of each report, the 2009 report ‘Implementing the responsibility to protect’ was important as it presented a larger programmatic overview of Ban’s strategy to implement the responsibility to protect within the United Nations system.¹⁵⁴⁸ Ban emphasised in this report that the mandate of his own work on the responsibility to protect would stay within the confines of the World Summit Outcome Document and that the “task ahead is not to reinterpret or renegotiate the conclusions of the World Summit but to find ways of implementing its decisions in a fully faithful and consistent manner”.¹⁵⁴⁹ In order to do so, the report breaks and translates articles 138-139 of the World Summit Outcome Document into three ‘pillars’. Pillar one addresses the responsibility of individual states (‘the protection responsibilities of the State’) while pillar two calls upon the responsibility of the international community represented through the United Nations system and its partner organizations (‘International assistance and capacity-building’). Finally, pillar three stresses the importance of ‘timely and decisive response’ in situations where a responsibility to protect might be invoked.¹⁵⁵⁰ According to Ban, the three pillars should neither be understood as sequential nor as unequally important as, metaphorically speaking, if “the three supporting pillars were of unequal length, the edifice of the responsibility to protect could become unstable, leaning preciously in one direction. Similarly, unless all three pillars are strong the edifice could implode and collapse”.¹⁵⁵¹ To focus on these pillars and to limit the protection of populations to the “four crimes and violations” of genocide, war crimes, ethnic cleansing and crimes against humanity would keep the scope of the responsibility to protect “narrow” while making response at the same time “deep” through the employment of a “wide array of prevention and protection instruments”.¹⁵⁵² Later reports should address and reflect upon individual topics,

¹⁵⁴⁷ Welsh, 143.

¹⁵⁴⁸ United Nations Secretary-General, ‘Implementing the Responsibility to Protect’, A/63/66 (2009). Some of the basic ideas were already introduced in: Ban, ‘Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event’.

¹⁵⁴⁹ United Nations Secretary-General, Implementing the responsibility to protect, 4.

¹⁵⁵⁰ United Nations Secretary-General, 8–9.

¹⁵⁵¹ United Nations Secretary-General, 9.

¹⁵⁵² United Nations Secretary-General, 8. For further discussion see also Jennifer M. Welsh, ‘The “Narrow but Deep Approach” to Implementing the Responsibility to Protect: Reassessing the Focus on International Crimes’, in *Reconstructing Atrocity Prevention*, ed. Sheri P. Rosenberg, Tibi Galis, and Alex Zucker (Cambridge: Cambridge University Press, 2015), 81–94.

such as pillar one¹⁵⁵³, two¹⁵⁵⁴ and three¹⁵⁵⁵, the role of and interplay with regional and subregional organisations¹⁵⁵⁶, the development of early warning and assessment mechanisms¹⁵⁵⁷, the question of accountability,¹⁵⁵⁸ or they should present an evaluation of the first decade since the endorsement by the General Assembly¹⁵⁵⁹ and an outlook for the next decade.¹⁵⁶⁰

Although these instruments kept discussions about the responsibility to protect running within the United Nations, progress on its implementation was however slow. As a consequence, Ban emphasised in the 2015 implementation report that the “case for accelerating implementation could not be stronger”.¹⁵⁶¹ As main barriers to implement the responsibility to protect, Ban identified one year later “an alarming disregard for fundamental tenets of international law” and missing support in the prevention of international crimes on state level as well as the increasing perpetration of those crimes by external actors particularly in civil war situations.¹⁵⁶² In this broader context the specific language of ‘*mainstreaming*’ has gained more and more prominence over the years. As Ban had stated in the 2009 implementation report already:

“The United Nations and its range of agencies, funds and programmes have in place critical resources, activities and field operations that are already making important contributions to the elimination of these man-made scourges. They could do that much more effectively if goals

¹⁵⁵³ United Nations Secretary-General, ‘Responsibility to Protect: State Responsibility and Prevention’, A/67/929 – S/2013/399 (2013).

¹⁵⁵⁴ United Nations Secretary-General, ‘Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect’, A/68/947 – S/2014/449 (2014).

¹⁵⁵⁵ United Nations Secretary-General, Responsibility to Protect: Timely and Decisive Response.

¹⁵⁵⁶ United Nations Secretary-General, ‘The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect’, A/65/877 – S/2011/393 (2011).

¹⁵⁵⁷ United Nations Secretary-General, ‘Early Warning, Assessment and the Responsibility to Protect’, A/84/684 (2010).

¹⁵⁵⁸ United Nations Secretary-General, ‘Implementing the Responsibility to Protect: Accountability for Prevention’, A/71/1016 – S/2017/556 (2017). This was the first report of Antonio Gutierrez, of Ban Ki-moon’s successor as Secretary-General.

¹⁵⁵⁹ United Nations Secretary-General, ‘A Vital and Enduring Commitment: Implementing the Responsibility to Protect’, A/69/981 – S/2015/500 (2015).

¹⁵⁶⁰ United Nations Secretary-General, ‘Mobilizing Collective Action: The next Decade of the Responsibility to Protect’, A/70/999 – S/2016/620 (2016).

¹⁵⁶¹ United Nations Secretary-General, A vital and enduring commitment: implementing the responsibility to protect, 6.

¹⁵⁶² United Nations Secretary-General, Mobilizing collective action: the next decade of the responsibility to protect, 8–9.

relating to the responsibility to protect, including the protection of refugees and the internally displaced, were *mainstreamed* among their priorities, whether in the areas of human rights, humanitarian affairs, peacekeeping, political affairs or development”.¹⁵⁶³

While back then the responsibility to protect itself was understood as a tool to ‘mainstream’ between the different ‘agencies, funds and programmes’ within (and among) the United Nations, Ban noted a couple of years later, in 2016, that there is a need of “mainstreaming the responsibility to protect” in order to keep it running within the United Nations.¹⁵⁶⁴

In general, policy actors understand ‘mainstreaming’ as an important instrument to enhance contested concepts with ‘determinate’ meaning and to make them ready for implementation within larger bureaucracies.¹⁵⁶⁵ With regard to the specificity of the responsibility to protect one of the main instruments to ‘mainstream’ the responsibility to protect was the introduction of the concept of *atrocities crimes*. Although loosely appearing in earlier implementation reports, the concept is central since Ban’s 2013 report, where it is explicitly used as an umbrella term for the four crimes and violations of the 2005 General Assembly Outcome Document, namely genocide, crimes against humanity, war crimes and ethnic cleansing.¹⁵⁶⁶

The concept of atrocities crimes goes back to the work of David Scheffer, a legal scholar and former US Ambassador at-Large for War Crimes Issues under the Clinton administration. The necessity for conceptual innovation was for Scheffer

¹⁵⁶³ United Nations Secretary-General, Implementing the responsibility to protect, 29 (emphasis added).

¹⁵⁶⁴ See, for example, United Nations Secretary-General, Mobilizing collective action: the next decade of the responsibility to protect, 11.

¹⁵⁶⁵ For a critical reconstruction of the emergence and role of mainstreaming in the context human rights, see Martti Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1, no. 1 (2010): 47–58. It was in particular the Special Adviser on the Responsibility to Protect Edward C. Luck, who institutionalised mainstreaming mechanisms. For a discussion, see Alex J. Bellamy, ‘Mainstreaming the Responsibility to Protect in the United Nations System: Dilemmas, Challenges and Opportunities’, *Global Responsibility to Protect* 5, no. 2 (2013): 160. Luck, as pointed out above, is seen rather as an expert of the United Nations systems and inter-agency relations than of the responsibility to protect.

¹⁵⁶⁶ United Nations Secretary-General, Responsibility to protect: State responsibility and prevention, 1.

crucial in the aftermath of the Kosovo intervention as he identified a lacuna in existing legal vocabularies to justify timely response in situations of unfolding international crimes. As Scheffer argues, however, a traditional understanding of international crimes, in particular the crime of genocide with its demanding requirement of proof of discriminatory intent (*mens rea*), would set the bar to intervene too high. Introducing the notion of ‘atrocity crimes’ would help instead to “liberate governments and international organizations from the genocide factor”.¹⁵⁶⁷ It would bring in, as Scheffer writes, a “terminology adaptable enough so that at the policy level we know how to react quickly to deal with the killing in an efficient and timely way and not let the law stymie the policy implementation on the ground”.¹⁵⁶⁸ Yet, this does not mean, for Scheffer, that one should abandon traditional categories of international crimes at all but rather “maintain these important distinctions among crimes in the law, because the prosecution and defense need these distinctions”.¹⁵⁶⁹ Nevertheless, in order to react in unfolding situations of international criminal acts these distinctions represent for Scheffer too much of a legalistic straightjacket. Scheffer connects these considerations directly to discussions about interventionism and the responsibility to protect when he writes:

“Humanitarian intervention and the recent articulation of a responsibility to protect civilian populations at risk, both of which remain controversial areas of international law, might be better understood and more supportable politically if the object of intervention or action to protect were to end or prevent an atrocity crime, rather than having politicians, military commanders, and their government lawyers and spokespersons claim that such massive military measures are required to confront war crimes, crimes against humanity, or violation of international humanitarian law. The crime of genocide can be left untethered as a powerful public rationale for

¹⁵⁶⁷ David Scheffer, ‘Genocide and Atrocity Crimes’, *Genocide Studies and Prevention* 1, no. 3 (2006): 229. For a similar argument, see, e.g., Scott Straus, ‘What Is Being Prevented? Genocide, Mass Atrocity, and Conceptual Ambiguity in the Anti-Atrocity Movement’, in *Reconstructing Atrocity Prevention*, ed. Sheri P. Rosenberg, Tibi Galis, and Alex Zucker (Cambridge: Cambridge University Press, 2015), 21–23.

¹⁵⁶⁸ David Scheffer, ‘Arresting War Criminals: Mission Creep or Mission Impossible’, *Case Western Reserve Journal of International Law* 35, no. 2 (2003): 319.

¹⁵⁶⁹ Scheffer, 319.

humanitarian intervention or an action to protect. But short of literally calling a situation a genocide, which experience is a struggle for governments and international organizations, there is need for a powerful and accurate term that can be readily understood as justifying the extraordinary and legally controversial initiative of a humanitarian intervention or action to protect populations at risk. That term is ‘atrocity crimes’.¹⁵⁷⁰

The language of ‘atrocity crimes’ and ‘atrocity’ should rapidly influence the vernacular of international humanitarianism. As such it should become an important cornerstone of, in particular, US-American initiatives culminating in the creation of an Atrocity Prevention Board (APB) under the Obama administration,¹⁵⁷¹ it should be echoed in various scholarly discussions and publications,¹⁵⁷² it should be adopted by and translated into program proposals of nongovernmental organisations¹⁵⁷³ and, as mentioned, it should be a central concept for Secretary-General Ban Ki-moon in his attempt of ‘materializing’, ‘implementing’, ‘mainstreaming’ and ‘operationalizing’ the responsibility to protect within the United Nations system.¹⁵⁷⁴ As we will see below, the notion of atrocity crimes builds a perfect ‘black box’ in order to travel within organisations and to advance new jurisdictional projects.

¹⁵⁷⁰ Scheffer, ‘Genocide and Atrocity Crimes’, 247.

¹⁵⁷¹ The APB attempts to institutionalise the assessment of atrocity crimes and to develop strategies of how to reduce them. For further discussion see Lee Feinstein and Tod Lindberg, ‘Arresting Atrocity: Obama’s Agenda to Prevent Genocide’, *Foreign Affairs*, 11 September 2015; Serena K. Sharma and Jennifer M. Welsh, ‘Introduction’, in *The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention* (Oxford: Oxford University Press, 2015), 3; and Welsh, ‘Implementing the “Responsibility to Protect”’, 138–139.

¹⁵⁷² From the expanding scholarly literature on atrocity crimes, see, for example, Ainley, ‘From Atrocity Crimes to Human Rights’; Sheri P. Rosenberg, Tiberiu Galis, and Alex Zucker, eds., *Reconstructing Atrocity Prevention*, 2016; Robert I. Rotberg, ed., *Mass Atrocity Crimes: Preventing Future Outrages* (Washington: Brookings Institution Press, 2010). Gareth Evans explicitly adopts Scheffer’s approach. As noted above, Evans was co-chair of both the ICISS and the ‘High-level panel on Threats, Challenges and Change’. See Evans, *The Responsibility to Protect*, chap. 1.

¹⁵⁷³ For instance, ‘AtrocityWatch’ was founded. The organisation describes its mission statement as follows: ‘Provide an early warning of precursors to genocide, war crimes, ethnic cleansing, and crimes against humanity through crowd sourcing, big data and the impartial presentation of analytic results’, AtrocityWatch, ‘Mission Statement’, 2014.

¹⁵⁷⁴ As Ban stated, for example, in the first implementation report: ‘Eliminating mass atrocity crimes will continue to be one of the cardinal objectives of my tenure as Secretary-General’, United Nations Secretary-General, *Implementing the responsibility to protect*, para. 69.

4.2 A Framework of Analysis: The Making of an Indicator

One result of these various initiatives, processes and debates was the creation of indicators – in particular indicators evaluating the risk of emerging responsibility to protect situations – within the United Nations system and beyond. These indicators are important instruments in jurisdictional competitions with regard to the responsibility to protect – and ‘humanity’s law’ more generally. In this context indicators help to translate projects like and related to the responsibility to protect and ‘humanity’s law’ into numbers and other equivalences. By doing so these projects are made comparable and implementable across new areas. To illustrate what it means to translate the responsibility to protect and ‘humanity’s law’ into the specific setting and form of an indicator, I will introduce in this sub-section one specific indicator, namely the *Framework of Analysis for Atrocity Crimes: A tool for prevention*.¹⁵⁷⁵ Importantly, the *Framework of Analysis for Atrocity Crimes* is an indicator in the form of a qualitative *risk* indicator. To have an in-depth look at this indicator helps me to establish the basis for the more general discussion on global legal indicators, risk and humanity in the next sub-section.

The *Framework of Analysis for Atrocity Crimes* was published in 2014 and is part of the larger prevention strategy, which was set out in the Secretary-General’s 2010 implementation report aiming to enhance early warning mechanisms and to build up capacities to help populations at risk.¹⁵⁷⁶ Moreover, the Framework is, as Ban Ki-moon notes in the 2016 implementation report, “essential” in mainstreaming the responsibility to protect as it is “integrated into existing human rights and conflict analysis methodologies used by the United Nations system”.¹⁵⁷⁷ As Ban further reports, outside the United Nations “[s]ome regional bodies [...] and individual Member States [...] have begun to incorporate the Framework into their

¹⁵⁷⁵ United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (New York, 2014).

¹⁵⁷⁶ United Nations Secretary-General, Early warning, assessment and the responsibility to protect. Prevention has become the core of the responsibility to protect. As, for example, Serena Sharma and Jennifer Welsh note: ‘Among the key constitutive elements of the principle of R2P, prevention has deemed by many as the single most important. Scholars and policy makers alike concede that it is both normatively and politically desirable to act to prevent atrocity crimes from being committed - rather than to react after they are already underway’. Sharma and Welsh, ‘Introduction’, 1. See also the discussion in Bellamy, *Responsibility to Protect*, 4.

¹⁵⁷⁷ United Nations Secretary-General, Mobilizing collective action: the next decade of the responsibility to protect, 12.

own analysis”.¹⁵⁷⁸ The Framework was developed by both the Special Adviser on the Prevention for Genocide and Atrocity Crimes as well as the Special Adviser of the Responsibility Protect, who were at the time of the publication of the Framework Adama Dieng and Jennifer Welsh.¹⁵⁷⁹ It presents thus a result of the cooperation within the Office on Genocide Prevention and the Responsibility to Protect (or ‘joint office’). It builds directly on previous work of the Office of the UN Special Adviser on the Prevention of Genocide and here particularly another – earlier – framework, namely the *Analysis Framework*, which was published in 2009 and which was produced to “determine whether there may be a risk of genocide in a given situation”.¹⁵⁸⁰ In general, this early *Analysis Framework* is rather simple: after being introduced by a legal definition of genocide, it lists eight categories of risk factors, which are outlined in rather broad strokes (i.e., including only a few bullet points for each factor) and which are not made quantifiable. The overall background of this indicator was to sensitize the different bodies within the United Nations systems for different types of risk when it comes to the question whether a genocide might occur or not.¹⁵⁸¹

Compared to the initial *Analysis Framework*, the 2014 *Framework of Analysis for Atrocity Crimes* is far more elaborated and comprehensive. As it was produced by the ‘joint office’ of the two Advisers its scope includes not only the international crime of genocide but also the other atrocity crimes of the World Summit Outcome Document, i.e., crimes against humanity, war crimes and ethnic cleansing.¹⁵⁸² In order to better grasp how the Framework works, it is important to

¹⁵⁷⁸ United Nations Secretary-General, 12.

¹⁵⁷⁹ Adama Dieng, a Senegalese legal practitioner, succeeded Francis Deng as Special Adviser for the Prevention of Genocide and Atrocity Crimes in 2012; Jennifer Welsh, a Canadian International Relation scholar, followed Edward Luck in 2013. Both also published jointly a journal article in order to further explain the Framework: Adama Dieng and Jennifer Welsh, ‘Assessing the Risk of Atrocity Crimes’, *Genocide Studies and Prevention* 9, no. 3 (2016): 4–12.

¹⁵⁸⁰ Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, ‘Analysis Framework’, 19 October 2009. As I will focus only on initiatives within the United Nations, I will not discuss other precursors, which were mainly developed by civil society initiatives. For example the Jacob Blaustein Institute for the Advancement of Human Rights produced a ‘compilation’ in order to ‘identify the major “risk factors” that could lead to the perpetration of genocide and the legal norms and standards that underlie these risk factors’. Jacob Blaustein Institute for the Advancement of Human Rights, *Compilation of Risk Factors and Legal Norms for the Prevention of Genocide* (New York: Jacob Blaustein Institute for the Advancement of Human Rights, 2011), viii.

¹⁵⁸¹ Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, ‘Analysis Framework’.

¹⁵⁸² United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes*, 5.

understand how it assembles and connects visual elements, text and lists of indicators.¹⁵⁸³ These connections are, furthermore, translations between different forms of representation.

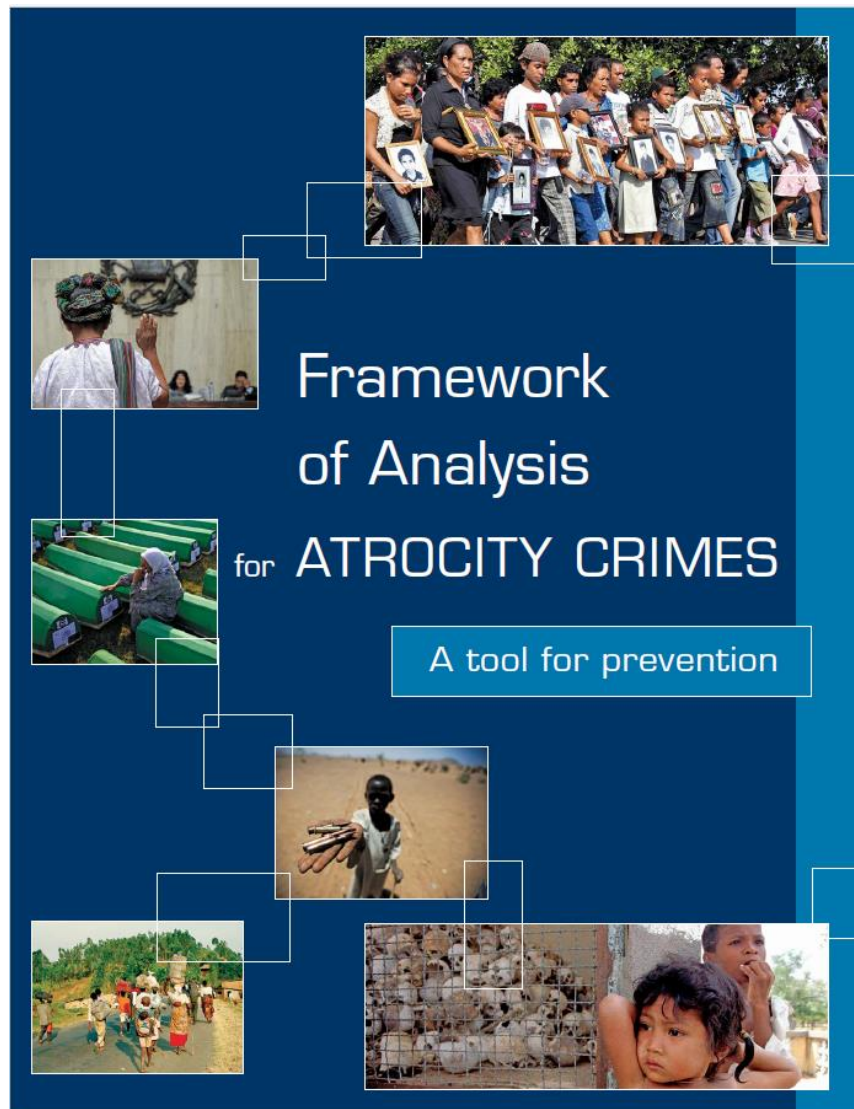


Figure 3. Cover. United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A tool for prevention*.

The cover page of the document presents a carefully composed collage of six photographs and states in bold letters the full title – *Framework of Analysis for Atrocity Crimes: A tool for prevention* (Figure 3). The pictures are further explained within the document. They depict (counter-clockwise from the top): ‘Santa Cruz massacre 17th anniversary march, Dili’; ‘A woman testifies in the trial of former

¹⁵⁸³ For a similar strategy to analyse a document see, for example, Annelise Riles, ‘Infinity within the Brackets’, *American Ethnologist* 25, no. 3 (1998): 378–98.

Guatemalan military dictator'; 'A woman mourns at the Srebrenica-Potocari memorial and cemetery'; 'Darfur village abandoned after heavy clashes'; 'Rwandan refugees returning from Goma'; Young children at the "Killing Fields" memorial in the outskirts of Phnom Penh'.¹⁵⁸⁴ All pictures were taken relatively recently: although some link to events in a distant past; these pictures bring them to the present.

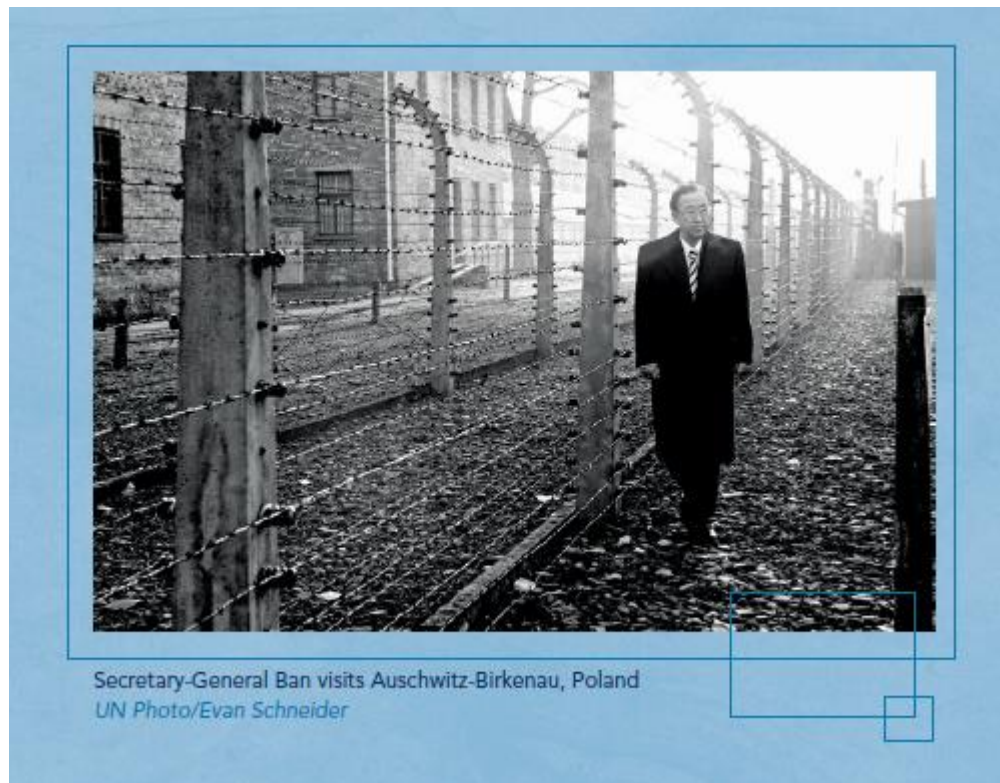


Figure 4. Ban in front of Auschwitz-Birkenau. United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A tool for prevention*.

The Framework opens then up with a foreword authored by UN Secretary-General Ban Ki-moon, which is accompanied by a picture showing Ban in front of Auschwitz-Birkenau (Figure 4). In the foreword, Ban connects the past of the Holocaust and other atrocities with the risk of future atrocity crimes when he writes:

¹⁵⁸⁴ United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes*, i.

“Prevention means acting early; to do that we need to know what to look for. Together with a commitment to accountability, we owe this to the millions of victims of the horrific international crimes of the *past* – and those whose lives we may be able to save in the *future*”.¹⁵⁸⁵

Elsewhere in the foreword Ban states that “we are committed to upholding the promise of ‘never again’, and drawing lessons from *past failures*”.¹⁵⁸⁶ To develop a framework that connects past failure with future risk has become important as “[a]trocities crimes take place on a large scale, and are not spontaneous or isolated events; *they are processes, with histories, precursors and triggering factors which, combined, enable their commission*”.¹⁵⁸⁷ To translate these experiences into an indicator and to make them thus evaluable for future operations is the purpose of the Framework: “With the help of the Framework, we can better sound the alarm, promote action, improve monitoring or early warning by different actors, and help Member States to identify gaps in their atrocity prevention capacities and strategies”.¹⁵⁸⁸ Moreover, the Framework might serve to ‘mainstream’ the United Nations in terms of ‘humanity’s law’ as it could support a “system-wide revision of the way we respond to situations of serious violations of international human rights and humanitarian law [...]. In practice, it means putting human rights, the protection of civilians and the prevention of atrocity crimes as the centre of our work”.¹⁵⁸⁹

The *Framework of Analysis for Atrocity Crimes* is further contextualised by a detailed introduction written by the ‘joint office’ of the two Advisers. The introduction reaffirms at its outset the importance of fighting atrocity crimes as they “are considered to be the most serious crimes against humankind. Their status as international crimes is based on the belief that the acts associated with them affect the core dignity of human beings, in particular the dignity of being that

¹⁵⁸⁵ Ban, ‘Foreword’, in *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, ed. United Nations Office on Genocide Prevention and the Responsibility to Protect (United Nations, 2014), iii (emphasis added).

¹⁵⁸⁶ Ban, iii.

¹⁵⁸⁷ Ban, iii (emphasis added).

¹⁵⁸⁸ Ban, iii.

¹⁵⁸⁹ Ban, iii.

should be most protected by States”.¹⁵⁹⁰ Fighting atrocity crimes is, in addition, important in order to guarantee peace and stability on a national, regional and international level. In line with other proponents of the responsibility to protect, the Office on Genocide Prevention and the Responsibility to Protect argues that “by taking measures to prevent atrocity crimes and fulfilling their primary responsibility States reinforce their sovereignty and reduce the need for more intrusive forms of response from other States or international actors”.¹⁵⁹¹ This position is of course an entire inversion of the traditional notion of sovereignty based on non-interference and exclusive territorial jurisdiction.

Importantly, the authors emphasise that there is not only a “moral and ethical responsibility that we all have to protect populations at risk of atrocity crimes, both individually and collectively” but that “there are also well-established legal obligations to do so”.¹⁵⁹² In order to substantiate this claim, the Framework refers to a number of treaties, customary law, decisions of international courts as well as the “principle of the Responsibility to Protect” of the 2005 World Summit Outcome Document.¹⁵⁹³ The Framework claims hence a “*legal responsibility* to protect atrocity crimes”.¹⁵⁹⁴ To back the *legal* dimension the Framework includes also an annex of “Legal Definitions of Atrocity Crimes”.¹⁵⁹⁵ In other words, by emphasising these various legal sources the Office on Genocide Prevention and the Responsibility to Protect frames the responsibility to protect populations from the risk of atrocity crimes as a legal or at least law-like project.

Moreover, the Framework translates this project into *the managerial language of risk assessment*. The ‘joint office’ argues that it “provides an integrated analysis and risk assessment tool for atrocity crimes” and, more precisely, “serves as a working tool for the assessment of the risk of atrocity crimes in all parts of the world and in identifying those countries most at risk”.¹⁵⁹⁶ In a different manner to

¹⁵⁹⁰ United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes*, 1.

¹⁵⁹¹ United Nations Office on Genocide Prevention and the Responsibility to Protect, 2.

¹⁵⁹² United Nations Office on Genocide Prevention and the Responsibility to Protect, 2.

¹⁵⁹³ United Nations Office on Genocide Prevention and the Responsibility to Protect, 2–3.

¹⁵⁹⁴ United Nations Office on Genocide Prevention and the Responsibility to Protect, 2 (emphasis added).

¹⁵⁹⁵ United Nations Office on Genocide Prevention and the Responsibility to Protect, 26–32.

¹⁵⁹⁶ United Nations Office on Genocide Prevention and the Responsibility to Protect, 5.

the earlier *Analysis Framework* of 2009, the *Framework of Analysis for Atrocity Crimes* of 2014 is explicitly a “public document” that should help to mainstream the assessment of atrocity crimes not only within the United Nations system but should also be used “by international, regional and national actors as a tool either for early warning mechanisms, or for other mechanisms used for monitoring, assessment and forecasting”.¹⁵⁹⁷

In order to operationalize this, the Framework introduces 14 broader *risk factors* and subdivides each of these risk factors into several *indicators*. Yet, what exactly is the difference between risk factors and indicators? How do they hang together? How is the Framework supposed to be used? Firstly, risk factors are defined as

“conditions that increase the risk of or susceptibility to negative outcomes. Those identified in this framework include behaviours, circumstances or elements that create an environment conducive to the commission of atrocity crimes, or indicate the potential, probability or risk of their occurrence”.¹⁵⁹⁸

The framework divides the 14 risk factors in two different ways: On the one hand, it groups all 14 risk factors into either structural (e.g., weak state structure) or dynamic (e.g., specific ‘triggers’) factors; and, on the other hand, it splits the same 14 risk factors into factors that equally apply to all atrocity crimes and into those that are specific to either genocide, crimes against humanity or war crimes as each

¹⁵⁹⁷ United Nations Office on Genocide Prevention and the Responsibility to Protect, 5.

¹⁵⁹⁸ United Nations Office on Genocide Prevention and the Responsibility to Protect, 5. The 14 risk factors comprise: 1) Situations of armed conflict or other forms of instability; 2) record of serious violations of international human rights and humanitarian law; 3) weakness of state structures; 4) motives or incentives; 5) capacity to commit atrocity crime; 6) absence of mitigating factors; 7) enabling circumstances or preparatory action; 8) triggering factors; 9) intergroup tensions or patterns of discrimination against protected groups; 10) signs of an intent to destroy in whole or in part a protected group; 11) signs of a widespread or systematic attack against any civilian population; 12) signs of a plan or policy to attack any civilian population; 13) serious threats to those protected under international humanitarian law; 14) serious threats to humanitarian or peacekeeping operations. See United Nations Office on Genocide Prevention and the Responsibility to Protect, 9–24.

of these crimes has its own features and trajectories.¹⁵⁹⁹ Secondly, indicators are defined as

“different manifestations of each risk factor, and therefore assist in determining the degree to which an individual risk factor is present. The particular indicators identified in the Framework have been drawn from *past and current cases*”.¹⁶⁰⁰

Moreover, it is explained how the Framework should be used in a “given situation”, namely “a monitor or analyst, should use the risk factors and indicators to guide the collection and assessment of information”.¹⁶⁰¹ If we take, for example, Risk Factor 1 (‘situations of armed conflict or other forms of instability’), a ‘monitor or analyst’ would have to check the eleven indicators. He or she would also be provided with a brief common statement at the beginning and a larger comment towards the end, reflecting on the risk factor and its specific indicators more broadly (see figure 5).¹⁶⁰²

¹⁵⁹⁹ Ethnic cleansing is subsumed under these crimes and is not listed with specific risk factors.

¹⁶⁰⁰ United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes*, 6.

¹⁶⁰¹ United Nations Office on Genocide Prevention and the Responsibility to Protect, 6. See also Dieng and Welsh, ‘Assessing the Risk of Atrocity Crimes’.

¹⁶⁰² United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes*, 10.

COMMON

RISK FACTOR 1

Situations of armed conflict or other forms of instability

Situations that place a State under stress and generate an environment conducive to atrocity crimes.

Indicators

1.1	International or non-international armed conflict.
1.2	Security crisis caused by, among other factors, defection from peace agreements, armed conflict in neighboring countries, threats of external interventions or acts of terrorism.
1.3	Humanitarian crisis or emergency, including those caused by natural disasters or epidemics.
1.4	Political instability caused by abrupt or irregular regime change or transfer of power.
1.5	Political instability caused by disputes over power or growing nationalist, armed or radical opposition movements.
1.6	Political tension caused by autocratic regimes or severe political repression.
1.7	Economic instability caused by scarcity of resources or disputes over their use or exploitation.
1.8	Economic instability caused by severe crisis in the national economy.
1.9	Economic instability caused by acute poverty, mass unemployment or deep horizontal inequalities.
1.10	Social instability caused by resistance to or mass protests against State authority or policies.
1.11	Social instability caused by exclusion or tensions based on identity issues, their perception or extremist forms.

Comment:

Atrocity crimes usually take place against a background of either an international or non-international armed conflict. Armed conflicts are periods characterized by a high incidence of violence, insecurity and the permissibility of acts that would otherwise not be acceptable. In addition, the capacity of States to inflict harm is usually at its peak during periods of conflict. If armed conflict is a violent way of dealing with problems, it is clear that the risk of atrocity crimes acutely increases during these periods. However, other situations that are not typical armed conflicts can also put a State under such a level of stress that it becomes more prone to serious human rights violations and, eventually, to atrocity crimes. In fact, genocide and crimes against humanity can also occur during times of peace. This is most likely when there are serious levels of political instability, threats to the security of the country or even volatility in economic or social affairs. Although situations of instability, or even of armed conflict, will not necessarily lead to the occurrence of atrocity crimes, they highly increase the likelihood of those crimes.

Figure 5. Risk Factor 1. United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A tool for prevention*.

The remaining risk factors and the respective indicators work in a similar way. However, what is important to note here, is that the *Framework of Analysis for Atrocity Crimes*, although introduced as being part of a larger strategy of a responsibility to *prevent* atrocity crimes, can turn into a trigger mechanism, when it comes to decide whether to *intervene* (in various forms) or not in a given situation (something that would be addressed in the context of the responsibility to protect in terms of the responsibility to react). As the two advisers Dieng and Welsh admit elsewhere, “it has also be designed to facilitate early action”.¹⁶⁰³ In

¹⁶⁰³ Dieng and Welsh, ‘Assessing the Risk of Atrocity Crimes’, 11.

other words, technologies such as the indicators of the *Framework of Analysis for Atrocity Crimes* create a grey zone between prevention and intervention and operate as “interim measures that postpone substantive resolutions into the future”.¹⁶⁰⁴ Thus, the translation of the responsibility to protect into indicators, particularly indicators in the language of risk assessment tools, opens up new jurisdictional spaces – spaces that are then open for contestation between different politico-legal projects. Importantly, it is the shift from normative to cognitive expectations and related to it a shift in the temporality of law, which makes this development possible. I will reflect on this and other connected transformations in the following sub-section.

4.3 Risk, Global Legal Indicators and the Production of Temporal Uncertainty

What does it mean to translate ‘humanity’s law’ in general and the responsibility to protect through ‘atrocity crimes’ in particular into an *indicator*? What does it mean to do so by relying on the specific form of a *risk* indicator? In order to address these questions, this sub-section discusses two interrelated themes and connects them to more general developments in social theory: first, the translation effects of the indicartorization of the responsibility to protect, atrocity crimes and, more generally, ‘humanity’s law’ (4.3.1); second, shifts in the temporality of the international legal argument through the emergence of risk-based vocabularies (4.3.2).

4.3.1 Indicatorization: The Politics of Quantification

Initiatives such as the *Framework of Analysis for Atrocity Crimes* of the United Nations Office on Genocide Prevention and the Responsibility to Protect are part of a larger turn to new forms of ‘measurement-driven governance’ on a global scale. As Jacqueline Best recently noted, “[g]lobal governance is increasingly about

¹⁶⁰⁴ Sally Engle Merry and Susan Bibler Coutin, ‘Technologies of Truth in the Anthropology of Conflict’, *American Ethnologist* 41, no. 1 (2014): 11.

measuring, ranking, and scoring”.¹⁶⁰⁵ Although ‘measurement driven-governance’ is hardly new, as the rise of various forms of measuring (particularly, statistics) is deeply connected to the emergence of the modern nation state and has since then become paramount in organizing and governing modern societies,¹⁶⁰⁶ the at-large use of these techniques on a *global* scale constitutes, however, a relatively recent phenomenon. In this regard, ‘measurement-driven governance’ encompasses various – often related, sometimes overlapping – techniques such as benchmarks,¹⁶⁰⁷ standards,¹⁶⁰⁸ rankings and ratings,¹⁶⁰⁹ lists¹⁶¹⁰ and indicators.¹⁶¹¹ These techniques are issued and/or produced by governments, international organizations, non-governmental organizations and the private sector.¹⁶¹² For example, if we focus on the proliferation of indicators, the fabrication, circulation and use of indicators has become ubiquitous in international relations and international law as we find today indicators measuring, assessing and evaluating,

¹⁶⁰⁵ Jacqueline Best, ‘The Rise of Measurement-Driven Governance: The Case of International Development’, *Global Governance: A Review of Multilateralism and International Organizations* 23, no. 2 (2017): 163.

¹⁶⁰⁶ Cf. Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1978-1979* (London: Palgrave Macmillan, 2009); Ian Hacking, *The Taming of Chance* (Cambridge: Cambridge University Press, 1990); and Alain Desrosières, *The Politics of Large Numbers: A History of Statistical Reasoning* (Cambridge: Harvard University Press, 2011). See also my short discussion towards the end of Chapter 5.

¹⁶⁰⁷ Cf. André Broome, Alexandra Homolar, and Matthias Kranke, ‘Bad Science: International Organizations and the Indirect Power of Global Benchmarking’, *European Journal of International Relations*, forthcoming; and the special issue introduced by André Broome and Joel Quirk, ‘The Politics of Numbers: The Normative Agendas of Global Benchmarking’, *Review of International Studies* 41, no. 5 (2015): 813–18.

¹⁶⁰⁸ Cf. Jean-Christophe Graz and Christophe Hauert, ‘Beyond the Transatlantic Divide: The Multiple Authorities of Standards in the Global Political Economy of Services’, *Business and Politics* 16, no. 1 (2014): 113–50; and Jean-Christophe Graz and Eva Hartmann, ‘Transnational Authority in the Knowledge-Based Economy: Who Sets the Standards of ICT Training and Certification?’, *International Political Sociology* 6, no. 3 (2012): 294–314.

¹⁶⁰⁹ Cf. Alexander Cooley and Jack Snyder, eds., *Ranking the World: Grading States as a Tool of Global Governance* (Cambridge: Cambridge University Press, 2015); and Timothy J. Sinclair, *The New Masters of Capital: American Bond Rating Agencies and the Politics of Creditworthiness* (Ithaca: Cornell University Press, 2005).

¹⁶¹⁰ Cf. Marieke de Goede, Anna Leander, and Gavin Sullivan, ‘Introduction: The Politics of the List’, *Environment and Planning D: Society and Space* 34, no. 1 (2016): 3–13; Gavin Sullivan, ‘Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List’, *Transnational Legal Theory* 5, no. 1 (2014): 81–127; and Urs Staeheli, ‘Listing the Global: Dis/connectivity beyond Representation?’, *Distinktion: Scandinavian Journal of Social Theory* 13, no. 3 (2012): 233–46.

¹⁶¹¹ While some authors conceptualise indicators as a sub-form of measurement-driven techniques, others use the term indicator itself as an umbrella for benchmarks, ratings, lists, indexes, etc.. See Kevin Davis, Benedict Kingsbury, and Sally Engle Merry, ‘Indicators as a Technology of Global Governance’, *Law & Society Review* 46, no. 1 (2012): 74.

¹⁶¹² Alexander Cooley, ‘The Emerging Politics of International Rankings and Ratings: A Framework for Analysis’, in *Ranking the World: Grading States as a Tool of Global Governance*, ed. Alexander Cooley and Jack Snyder (Cambridge: Cambridge University Press, 2015), 2.

for example, macroeconomic variables,¹⁶¹³ poverty reduction,¹⁶¹⁴ international development,¹⁶¹⁵ political freedom,¹⁶¹⁶ trafficking in persons,¹⁶¹⁷ the risk of environmental disasters,¹⁶¹⁸ the compliance with international human rights norms,¹⁶¹⁹ the rule of law¹⁶²⁰ or such mundane practices as the impact of international legal scholarly work.¹⁶²¹ In the context of the prevention of international crimes we find, apart from the *Analysis Framework* of 2009 and the *Framework of Analysis for Atrocity Crimes* of 2014, several civil society initiatives working on and producing indicators on this topic. For instance, the non-governmental organisation 'Genocide Watch' provides us with a ten-stage model to evaluate countries at risk of genocide;¹⁶²² while 'AtrocityWatch' attempts to mobilize big data and, then, to transform it into an indicator in order to create an early warning mechanism for atrocity crimes;¹⁶²³ and, the Asia-Pacific Centre for the Responsibility to Protect actually tests countries that might be at risk of atrocity crimes vis-à-vis the United Nation's *Framework of Analysis for Atrocity Crimes*.¹⁶²⁴ Likewise, academics such as (in particular) Barbara Harff develop

¹⁶¹³ Cf. Daniel Mücke, 'Studying Macroeconomic Indicators as Powerful Ideas', *Journal of European Public Policy* 23, no. 3 (2016): 410–27.

¹⁶¹⁴ Cf. Katja Freistein, 'Effects of Indicator Use: A Comparison of Poverty Measuring Instruments at the World Bank', *Journal of Comparative Policy Analysis: Research and Practice* 18, no. 4 (2016): 366–81.

¹⁶¹⁵ Cf. Best, 'The Rise of Measurement-Driven Governance'; and Tor Krever, 'Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense', *Third World Quarterly* 34, no. 1 (2013): 131–50.

¹⁶¹⁶ Cf. Sarah Sunn Bush, 'The Politics of Rating Freedom: Ideological Affinity, Private Authority, and the Freedom in the World Ratings', *Perspectives on Politics* 15, no. 3 (2017): 711–31.

¹⁶¹⁷ Cf. Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago: The University of Chicago Press, 2016); and Judith G. Kelley and Beth A. Simmons, 'Politics by Number: Indicators as Social Pressure in International Relations', *American Journal of Political Science* 59, no. 1 (2015): 55–70.

¹⁶¹⁸ United Nations Office of Disaster Risk Reduction, *Sendai Framework for Disaster Risk Reduction 2015-2030* (Geneva, 2015).

¹⁶¹⁹ Cf. Merry, *The Seductions of Quantification*; Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance', *Current Anthropology* 52, no. S3 (2011): 83–95; and Rene Urueña, 'Indicators as Political Spaces: Law, International Organizations, and the Quantitative Challenge in Global Governance', *International Organizations Law Review* 12, no. 1 (2015): 1–18.

¹⁶²⁰ Cf. René Urueña, 'Indicators and the Law: A Case Study of the Rule of Law Index', in *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law*, ed. Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury (Cambridge: Cambridge University Press, 2015), 75–102.

¹⁶²¹ Cf. Geoffrey Gordon, 'Indicators, Rankings and the Political Economy of Academic Production in International Law', *Leiden Journal of International Law* 30, no. 2 (2017): 295–304.

¹⁶²² Gregory H. Stanton, 'The Ten Stages of Genocide', 2006.

¹⁶²³ See AtrocityWatch, 'Mission Statement'.

¹⁶²⁴ See, for example, Asia-Pacific Centre for the Responsibility to Protect, 'Timor-Leste', Atrocity Crimes Risk Assessment Series, 2016.

quantitative indicators to assess the risk of atrocity crimes.¹⁶²⁵ These latter initiatives are also part of a larger, as Tor Krever had put it, “project of quantifying international law” on a global scale.¹⁶²⁶

In more general terms, critical scholars from various disciplinary backgrounds, including IR and IL, have started to problematize and theorize indicators on a global scale.¹⁶²⁷ As there is, according to Kevin E. Davis, Benedict Kingsbury and Sally Engle Merry, “no agreed meaning of the term *indicator*”,¹⁶²⁸ these authors provide us with an attempt of a definition, which can connect to and thus provide the basis for different strands of critical literature:

“An indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries, institutions, or corporations), synchronically or over time, and to evaluate their performance by reference to one or more

¹⁶²⁵ See Barbara Harff, ‘How to Use Risk Assessment and Early Warning in the Prevention and De-escalation of Genocide and Other Mass Atrocities’, *Global Responsibility to Protect* 1, no. 4 (2009): 506–31; and Barbara Harff, ‘No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955’, *American Political Science Review* 97, no. 1 (2003): 57–73.

¹⁶²⁶ Krever, ‘Quantifying Law’, 132. This move to quantification is also mirrored in the recent ‘empirical turn’ (i.e., large-n testing exercises of legal norms as empirical data) in North American international legal scholarship. See, for example, Gregory Shaffer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’, *The American Journal of International Law* 106, no. 1 (2012): 1–46. For a critique see Jakob V.H. Holtermann and Mikael Rask Madsen, ‘Toleration, Synthesis or Replacement? The “Empirical Turn” and Its Consequences for the Science of International Law’, *Leiden Journal of International Law* 29, no. 4 (2016): 1001–19.

¹⁶²⁷ In the intersection of international law and indicators, in particular contributions from a project on ‘Indicators as a Technology of Global Governance’ of the Institute for Law and Justice at New York University of Law stand out. Its main protagonists Kevin E. Davis, Benedict Kingsbury and Sally Engle Merry, attempt to bring global administrative law and critical social theory (anthropology, science and technology studies, governmentality studies) together. See, in particular, Kevin Davis et al., eds., *Governance by Indicators: Global Power through Classification and Rankings* (Oxford: Oxford University Press, 2012); Davis, Kingsbury, and Merry, ‘Indicators as a Technology of Global Governance’; Kevin Davis and Benedict Kingsbury, *Indicators as Interventions* (New York: Rockefeller Foundation, 2012); Kevin Davis and Michael Kruse, ‘Taking the Measure of Law: The Case of the Doing Business Project’, *Law & Social Inquiry* 32, no. 4 (2007): 1095–1119; Sally Engle Merry, Kevin Davis, and Benedict Kingsbury, eds., *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law* (New York: Cambridge University Press, 2015); and Merry, *The Seductions of Quantification*.

¹⁶²⁸ Davis, Kingsbury, and Merry, ‘Indicators as a Technology of Global Governance’, 73.

standards”.¹⁶²⁹

As Merry further explains, indicators are a “technology of knowledge creation, one that depends of processes of *translation and commensuration*. Creating indicators requires translating social life into commensurable categories so that different events become instances of the same thing”.¹⁶³⁰ Commensuration means to “transform[...] different qualities into a common metric”.¹⁶³¹ In other words, indicators “convert analogous into digital information”¹⁶³² and translate qualities into quantities. To translate qualities into quantities makes them then suitable and employable for at-large societal processes of auditing and verification.¹⁶³³ Importantly, this is not only the case for quantitative indicators but also for qualitative indicators, with the *Framework of Analysis for Atrocity Crimes* being an example of the latter, as they are usually designed in a similar way to establish commensuration (and being thus easily translatable into more quantitative schemes).¹⁶³⁴

Yet, commensuration is not a straightforward process and does not involve an automatism. As Sally Engle Merry and Susan Bibler Coutin emphasise, “[p]henomena are not intrinsically commensurate but are made so by creating equivalences, categories, and distinctions”.¹⁶³⁵ This means also that “[p]ower is embedded in these methodologies in ways that are not always obvious”.¹⁶³⁶ In a similar vein, for example, Theodore M. Porter points out that indicators and other forms of quantification do not describe and mirror a social and natural world out there, but are neither neutral, non-social nor apolitical.¹⁶³⁷ “Numbers”, Porter

¹⁶²⁹ Davis, Kingsbury, and Merry, 73–74.

¹⁶³⁰ Merry, *The Seductions of Quantification*, 27 (emphasis added).

¹⁶³¹ Wendy Nelson Espeland and Mitchell L. Stevens, ‘Commensuration as a Social Process’, *Annual Review of Sociology* 24, no. 1 (1998): 314.

¹⁶³² Urs Staeheli, ‘Indexing - The Politics of Invisibility’, *Environment and Planning D: Society and Space* 34, no. 1 (2016): 17. Digitalisation refers here to ‘practices that produce isolated, discontinuous items’, which means that ‘the digital does not restrict itself to new digital media’, Staeheli, 16.

¹⁶³³ Michael Power, ‘Making Things Auditable’, *Accounting, Organizations and Society* 21, no. 2–3 (1996): 289–315.

¹⁶³⁴ Merry, ‘Measuring the World’, 86.

¹⁶³⁵ Merry and Coutin, ‘Technologies of Truth in the Anthropology of Conflict’, 12.

¹⁶³⁶ Merry and Coutin, 12. See also Espeland and Stevens, ‘Commensuration as a Social Process’, 330–332.

¹⁶³⁷ Theodore M. Porter, ‘Making Things Quantitative’, *Science in Context* 7, no. 3 (1994): 389–407.

explains, “create new things and transform the meaning of old ones”.¹⁶³⁸ In other words, critical scholars moved from the question of whether numbers in general or a specific indicator perfectly measure the world as it ‘is’, to the question of what numbers and indicators ‘do’. This resembles, of course, earlier discussions of language and law among radical constructivists in IR and critical legal scholars in IL – and the abandonment of the mirror image of language as well as of questions such as whether international law is ‘really’ law.¹⁶³⁹ Similarly, indicators are then best understood as instruments of world-making and as means that produce, e.g., new relations and new entities. Indicators create the world they measure. Speaking with Luhmann they are not only observations of the world; they are simultaneously operations creating, ordering and maintaining the world itself.¹⁶⁴⁰ Moreover, indicators are a form of what Latour called “immutable mobiles” and, hence, “allow translation without corruption”.¹⁶⁴¹ In these aspects, indicators resemble maps.¹⁶⁴² However, where maps attempt to establish the social imaginary of objectivity through means of visualisation, indicators rely on numbers.¹⁶⁴³ To emphasise that indicators are *political*, involves different dimensions of the politics of indicators. It means not only that indicators are, like other techniques of ‘measurement-driven governance’, mobilised by different social forces, including political activists and social movement, to substantiate

¹⁶³⁸ Theodore M. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton: Princeton University Press, 1995), 17.

¹⁶³⁹ Hans Krause Hansen and Tony Porter compare for IR the insight that numbers do not fulfil a representational function but are performative to the post-positivist critique of the (scientific) positivist view of language: The ‘lack [to acknowledge the performative dimension of numbers] in more conventional literatures is reminiscent of an earlier neglect of the role played by language, a neglect that has now been remedied by a variety of discursive and constructivist approaches. While still contested, the idea that linguistically constituted norms can in turn have material effects, or even constitute actors, has come to be the focus of a vast amount of research and discussion. However, as was previously the case with language, when attention is directed to numbers, they are often treated simply as convenient representations of a reality from which they are disconnected. For casual users of numbers, this may be due to the apparent obviousness with which numbers can represent objects in daily routines, while for professionals, such as accountants or scientists, trust in the representational capacities of numbers is central to the purpose, acceptance and success of their work. Yet, even in the casual use of numbers there are clues that they do more than represent objects—that they also make it possible for objects to be defined, ordered and controlled in predictable ways’, Hans Krause Hansen and Tony Porter, ‘What Do Numbers Do in Transnational Governance?’, *International Political Sociology* 6, no. 4 (2012): 410. On the critique by radical constructivist and critical legal scholars of mainstream conceptions of law and language see also my discussion in Chapter 3.

¹⁶⁴⁰ See, for example, Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt/Main: Suhrkamp, 1997), 539.

¹⁶⁴¹ Bruno Latour, ‘Visualization and Cognition: Thinking with Eyes and Hands’, *Knowledge and Society* 6 (1986): 8.

¹⁶⁴² With regard to maps see my discussion in Chapter 5.

¹⁶⁴³ Porter, *Trust in Numbers*.

claims and counterclaims in situations of political contestation;¹⁶⁴⁴ it is also not restricted to the claim that indicators facilitate a fundamental societal transformation towards a neoliberal and managerial orthodoxy, which becomes visible in various forms of technocratic governance;¹⁶⁴⁵ moreover, it is also not limited to the political economy of indicator production and here, for example, the enormous financial and administrative costs involved in data collection and analysis, which is affordable only to a limited number of actors in “rich, industrialized countries”;¹⁶⁴⁶ Rather, to say that indicators are political, foregrounds the fact that indicators themselves are, in the words of Rene Urueña, “political spaces”.¹⁶⁴⁷ They are ‘political spaces’ as, for instance, every “indicator embodies a particular normative view of the world, which is reflected in the indicator’s design: the choice of what variables are to be included, and which are left out; how ‘raw’ information is gathered and by whom, *et cetera*”.¹⁶⁴⁸

To treat indicators as ‘political spaces’ points to the need to move away from treating indicators as ‘black boxes’ and to study instead processes of “indicatorization”, a term introduced by Siobhán Airey in the context of human rights indicators.¹⁶⁴⁹ As Airey specifies, “by adding the suffix ‘ization’ to ‘indicators’, the new combined term draws explicit attention to the deliberate and contingent nature underpinning the process by which a human right is ‘broken down’ [...] and re-articulated and re-conceptualized through the selection and use of data and indicators”.¹⁶⁵⁰ As we have seen in the discussion above, in order to

¹⁶⁴⁴ See Leonard Seabrooke and Duncan Wigan, ‘How Activists Use Benchmarks: Reformist and Revolutionary Benchmarks for Global Economic Justice’, *Review of International Studies* 41, no. 5 (2015): 887–904; and Isabelle Bruno, Emmanuel Didier, and Tommaso Vitale, ‘Statactivism: Forms of Action between Disclosure and Affirmation’, *Partecipazione e Conflitto* 7, no. 2 (2014): 198–220.

¹⁶⁴⁵ For example, Tor Krever argues with regard to law and development that legal indicators ‘should be understood not as an objective mirror but as a prism reflecting legal phenomena through a neoliberal reality and reproducing a neoliberal view of the law’ Krever, ‘Quantifying Law’, 131. For other claims on the neoliberal nature of indicators, see Tore Fougner, ‘Neoliberal Governance of States: The Role of Competitiveness Indexing and Country Benchmarking’, *Millennium: Journal of International Studies* 37, no. 2 (2008): 303–26; and Richard Rottenburg et al., eds., *The World of Indicators: The Making of Governmental Knowledge through Quantification* (Cambridge: Cambridge University Press, 2015).

¹⁶⁴⁶ Merry, *The Seductions of Quantification*, 31.

¹⁶⁴⁷ Urueña, ‘Indicators as Political Spaces’.

¹⁶⁴⁸ Urueña, 2.

¹⁶⁴⁹ Siobhán Airey, ‘The Taming of the ShriLL: From Indicators to Indicatorization: The Norm-Generation and Political Effects of Indicators on Human Rights’, *International Organizations Law Review* 12, no. 1 (2015): 82.

¹⁶⁵⁰ Airey, 87.

create the *Framework of Analysis for Atrocity Crimes* the responsibility to protect was 'broken down' in a specific way: the World Summit Outcome Document entangled the responsibility to protect discourse with the vernacular of the international crimes genocide, crimes against humanity, war crimes and ethnic cleansing as threshold elements – leaving “other calamities”¹⁶⁵¹ such as terrorism, aggression, political repression, HIV/AIDS, climate change and natural disasters out;¹⁶⁵² later the four distinct international crimes of genocide, crimes against humanity, war crimes and ethnic cleansing were lumped together and thereby made commensurable by introducing the umbrella term of ‘atrocity crimes’; atrocity crimes, in turn, were then split into fourteen risk factors with a number of respective indicators. As should be obvious from the previous discussion, each step in this ‘chain of translation’ presents an instance of deliberation and contingency.

To open the ‘black box’ of ‘indicatorization’ draws also attention to the similarities and differences between the forms (or logics, rationalities, modes, etc.) of law and indicators. With regard to *similarities*, Merry and Coutin note:

“Both law and systems of measurement are artifacts that are constructed at least partially out of pre-existing material, and, in this sense, they participate in the citational practices that are characteristic of language itself [...]. Crafting a statute, writing an opinion, creating a file, or issuing a document entails entextualization, that is, excerpting elements of other texts, documents, or records and redeploying them in a new case or context [...]. These redeployments invoke texts that have already been deemed authoritative, make use of agreed-on language, ensure that a new policy applies to a previously delineated population, and occur as part of corrective law-making cycles [...]. Each instantiation of law therefore builds on prior instantiations, even as each survey or analysis of data as well as its presentation rely on past templates, surveys, and data-analysis strategies. Both law and measurement systems are, in a sense, the residue of prior negotiations,

¹⁶⁵¹ United Nations Secretary-General, Implementing the responsibility to protect, 8.

¹⁶⁵² For further discussion of ‘omissions’ see also Chhabra and Zucker, ‘Defining the Crimes’, 58–60.

a residue that leads forward as well as into the past. In both cases, there can be considerable inertia as procedures and categories become naturalized.”¹⁶⁵³

By being a ‘residue that leads forward as well as into the past’, Merry and Coutin point to the temporal dimension of law and indicators. Merry and Coutin highlight in particular that attention

“to such layering is critical because the documents and texts of which both law and measurement are composed do not remain confined to a single historical stratum. Rather, past models and templates are brought forward as techniques of resolving new problems, while legal artifacts produced in one forum can reshape the claims being staked in another”.¹⁶⁵⁴

In other words, law and indicators both link past, present and future in a particular way, something which is also emphasised by Airey in the case of indicators. For Airey, “[d]epending on the nature and type of data and indicators available. Perspectives on what happened in the past (or indeed what the past *was*), as well as shared hopes for the future, can become encapsulated through choice of indicators”.¹⁶⁵⁵ As I discussed above, the *Framework of Analysis for Atrocity Crimes* connects past, present and future in a particular way. It connects by means of pictures, texts and lists the ‘horrific international crimes of the *past*’ in order ‘to save [lives] in the *future*’, it tells the history of these crimes in a specific way and tries to identify in and extrapolate from the past risk factors which can then be projected to current and future conflicts.

¹⁶⁵³ Merry and Coutin, ‘Technologies of Truth in the Anthropology of Conflict’, 3.

¹⁶⁵⁴ Merry and Coutin, 3.

¹⁶⁵⁵ Airey, ‘The Taming of the ShriII’, 88 (emphasis in the original).

4.3.2 Temporalisation: Risk

Yet, the question of temporality points also to the *differences* between the forms (or logics, rationalities, modes, etc.) of law and indicators. These differences become particularly visible in the context of the *Framework of Analysis for Atrocity Crimes* as this indicator is designed as a tool for *risk* assessment. For a while now, the concept of risk has played an important role in debates in the social sciences in general, in scholarly debates in the intersection of IR and IL in particular as well as, more recently, in policy circles – with the *Framework of Analysis for Atrocity Crimes* as an example of the latter.¹⁶⁵⁶ Broadly speaking we can observe a similar move as it was the case in the above discussion of law, language, numbers and indicators among critical scholars away from treating risk as constative utterance, i.e. an assessment of what risk ‘is’, to the concept’s performative consequences, i.e. what risk ‘does’ and how “risk creates its own reality”.¹⁶⁵⁷ Tied to this is also a shift away from treating risk as a mere probabilistic concept and a device of making an otherwise uncertain future measurable and thus perfectly controllable and governable – and where failure in risk assessment is reduced to a problem of wrong, missing or asymmetric information. Without going too much into detail, critical scholars argue that the recent emergence of ‘risk’ in international law points to a fundamental transformation in the structure of the international legal argument, in particular its temporality. As we have seen in Chapter 3, for example Friedrich Kratochwil highlights that law “is always more than simply an instrument of regulating present interferences and the inevitable conflicts among self-interested actors; it is also always part of a political project that connects the present via the past to a future ‘utopia’”.¹⁶⁵⁸ So does risk as well. It connects past, present and future. But risk and law connect past, present and future in different

¹⁶⁵⁶ These different literatures cannot be captured in a footnote. However, for contributions in the intersection of IR and IL see, for example, the fora introduced by Fleur Johns and Wouter Werner, ‘The Risks of International Law’, *Leiden Journal of International Law* 21, no. 4 (2008): 783–86; and Tanja E. Aalberts and Erna Rijdsdijk, ‘Mobilising Uncertainty and Responsibility in International Politics and Law: Guest Editors’ Introduction’, *Review of International Studies* 37, no. 5 (2011): 2157–61. For a discussion, which focuses more on policy initiatives in different (sub)fields of international law, see, for example, Mónika Ambrus, Rosemary Rayfuse, and Wouter Werner, eds., *Risk and the Regulation of Uncertainty* (Oxford: Oxford University Press, 2017).

¹⁶⁵⁷ Oliver Kessler, ‘Is Risk Changing the Politics of Legal Argumentation?’, *Leiden Journal of International Law* 21, no. 4 (2008): 867, 868.

¹⁶⁵⁸ Friedrich Kratochwil, ‘Legal Theory and International Law’, in *Routledge Handbook of International Law*, ed. David Armstrong (London: Routledge, 2009), 56.

ways as they rely on different temporalities. In order to illustrate this, let me advance my argument in three interrelated steps.

Firstly, legal argumentation is rather past-oriented. Here, my discussion in Chapter 3 of how Kratochwil conceptualises legal argumentation is indicative again, as Kratochwil emphasises the importance of analogies in legal argumentation. Analogies, Kratochwil writes, “establish similarities among different cases or objects in face of (striking) dissimilarities. The similarity established thereby concerns a (partial) equality among the compared objects or phenomena in regard to a relevant aspect”.¹⁶⁵⁹ Importantly, similarities are ‘established’ and not ‘found’ and ‘pre-given’. What counts as similarity is always linked to a specific context. This point is further explained, for instance, by Stanley Fish in his attempt of scrutinizing the ‘chain gang of law’. As Fish notes

“similarity is not something one finds, but something one must establish, and when one establishes it one establishes the configurations of the cited cases as well as of the case that is to be decided. Similarity, in short, is not a property of texts (similarities do not announce themselves), but a property conferred by a relational argument in which the statement *A* is like *B* is a characterization (one open to challenge) of *both A* and *B*. To see a present-day case as similar to a chain of earlier ones is to reconceive that chain by finding it in an applicability that has not always been apparent”.¹⁶⁶⁰

To establish similarities in legal argumentation is a past-oriented endeavour; an endeavour where legal history plays an important role. Lawyers refer back to past decisions, judgements and dissenting opinions or even the *travaux préparatoires* of treaties.¹⁶⁶¹ This referring back is, of course, always a selective reading of the past (as a ‘history of the present’). As Fish continues to argue:

¹⁶⁵⁹ Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989), 223.

¹⁶⁶⁰ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 94 (emphasis in the original).

¹⁶⁶¹ See Filipe dos Reis and Oliver Kessler, ‘Constructivism and the Politics of International Law’, in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 362–363.

“Paradoxically, one can be faithful to legal history only by revising it, by rediscirbing it in such a way as to accommodate and render manageable the issues raised by the present. This is a function of the law’s conservatism, which will not allow a case to remain unrelated to the past, and so assures that the past, in the form of the history of decisions, will be continually rewritten. In fact, it is the *duty* of a judge to rewrite it (which is to say no more than that it is the duty of a judge to decide)”.¹⁶⁶²

Nevertheless, to establish these similarities with the past is of particular importance for legal argumentation as it also establishes consistency overtime, i.e. that similar cases are decided similarly and different ones differently. Legal history operates thus as law’s memory.¹⁶⁶³

Secondly, as Niklas Luhmann has pointed out, law operates through norms and relies mainly on a specific type of expectations, namely normative expectations.¹⁶⁶⁴ Normative expectations ‘bind’ time, contingency and uncertainty in a specific way, which can be distinguished from the way risk does. Luhmann remarks with regard to normative expectations:

“A norm stabilizes expectations, also and in particular where conduct is unexpected. Where norms are violated, it is not the expectation but the conduct that is wrong. Although one can have erred in respect of the facts, one has not done so on the normative side of expectation. In other words, the violation of the norm offers no occasion for amending it, no occasion for learning; it condenses and confirms expectation in

¹⁶⁶² Fish, *Doing What Comes Naturally*, 94 (emphasis in the original).

¹⁶⁶³ Sven Opitz, *An der Grenze des Rechts: Inklusion/Exklusion im Zeichen der Sicherheit* (Weilerswist: Velbrück, 2012), 70–71.

¹⁶⁶⁴ In general, Luhmann is one of the most interesting authors when it comes to discuss the temporality of law as for him the temporal dimension of law represents the basis of the function of law. For Luhmann, law solves temporal problems of societal communication, namely when communication relies on expectations. This differentiates him from approaches, which emphasise the social function of law (e.g., ‘social control’ or ‘social integration’), Niklas Luhmann, *Das Recht Der Gesellschaft* (Frankfurt/Main: Suhrkamp, 1995), 125; see also Niklas Luhmann, ‘Die Funktion Des Rechts: Erwartungssicherung Oder Verhaltenssteuerung?’, in *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt/Main: Suhrkamp, 1999), 73.

providing an occasion to activate and confirm it”.¹⁶⁶⁵

This means, in turn, that norms are “counterfactual stabilisations of expectations of behaviour”.¹⁶⁶⁶ When disappointed they are counterfactually retained. This helps that one can remain indifferent towards the contingencies of the future as one can refer to the validity of the norm, whatever happens.¹⁶⁶⁷ This helps law to “defuturize the future”.¹⁶⁶⁸ Consequently, for Luhmann, the touchstone for the validity of norms is not compliance with a norm and the question of how norms determine behaviour.¹⁶⁶⁹ Behaviour based on normative expectations is not disposed toward learning and does not adapt in case of deviance from a norm – “the norm is valid as long it is valid”.¹⁶⁷⁰ This distinguishes normative expectation from cognitive ones. Cognitive expectations are based on the willingness to learn and are adapted if they are not satisfied, i.e. if reality is different than previously expected.¹⁶⁷¹ Although normative and cognitive expectations might often overlap, Luhmann argues that the emerging world society is linked to an at-large shift from normative to cognitive expectations.¹⁶⁷²

Thirdly and related to this, compared to the concept of norms, the concept of risk is more future-oriented.¹⁶⁷³ Drawing on the work of Reinhart Koselleck, Luhmann argues that the transition to modernity, in particular the second half of

¹⁶⁶⁵ Niklas Luhmann, *Risk: A Sociological Theory* (Berlin: de Gruyter, 1993), 54.

¹⁶⁶⁶ ‘kontrafaktisch stabilisiert[e] Verhaltenserwartung’, Luhmann, *Das Recht der Gesellschaft*, 134. This mirrors, of course, in IR the early constructivist statement of Kratochwil and Ruggie: ‘Norms are counterfactually valid’, Friedrich Kratochwil and John Gerard Ruggie, ‘International Organization: A State of the Art on an Art of the State’, *International Organization* 40, no. 4 (1986): 767.

¹⁶⁶⁷ See also Sven Opitz, ‘Widerstreitende Temporalitäten: Recht in Zeiten Des Risikos’, *Behemoth* 4, no. 2 (2011): 73.

¹⁶⁶⁸ Sven Opitz and Ute Tellmann, ‘Future Emergencies: Temporal Politics in Law and Economy’, *Theory, Culture & Society* 32, no. 2 (2015): 118.

¹⁶⁶⁹ In fact, as Luhmann further explains one might comply or not comply with a norm because it is unknown. Or, might comply or not comply with a norm because it provides certain information; and then does not comply with the norm, because one has more confidence in one’s own information. Or one does not comply with a norm because one does not perceive it as legitimate or fair. Or, one behaves in a certain way because of coercion and not because of a norm. In short, as Luhmann shows, to test the validity of a norm by relying on rates of compliance does not work. Luhmann, *Das Recht der Gesellschaft*, 134.

¹⁶⁷⁰ Luhmann, *Risk*, 54.

¹⁶⁷¹ Cf. Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Frankfurt am Main: Suhrkamp, 1984), 437; and Luhmann, *Das Recht der Gesellschaft*, 133–134.

¹⁶⁷² Niklas Luhmann, ‘Die Weltgesellschaft’, *Archiv Für Rechts- und Sozialphilosophie* 57, no. 1 (1971): 10–13; and Luhmann, ‘Die Funktion Des Rechts’, 90–91.

¹⁶⁷³ Niklas Luhmann, ‘Risiko und Gefahr’, in *Soziologische Aufklärung 5: Konstruktivistische Perspektiven*, ed. Niklas Luhmann (Wiesbaden: VS, 2005), 133.

the eighteenth century, marked a shift in the temporal structure, in which societies describe themselves, towards more future-oriented semantics¹⁶⁷⁴ - “the future gained primacy over the past”.¹⁶⁷⁵ As a consequence, the difference between past and future expands. Simultaneously, the present is increasingly important as a ‘switch’ between past and future as now “[a]ll temporal structures relate to the present”.¹⁶⁷⁶ In other words, modernity is “linked to an intensive *futurization* of the future”.¹⁶⁷⁷ Moreover, Luhmann observes,

“[t]he more a society makes its future dependent on its own future, the more intransparent this future becomes, because one can not know but must decide what the future will bring. At the same time, time begins to flow faster; or at least accelerations are noted. Expectations can no longer be based on experience as before”.¹⁶⁷⁸

Societies are confronted with the difference of ‘future presents’ and ‘present futures’: the future becomes an “open future”.¹⁶⁷⁹ At this point, the semantics of risk emerges in order to deal with this increasing complexity.¹⁶⁸⁰ However, as Luhmann writes, it is for the analysis of the semantics of risk important to note that

“the unlikely is likely to the extent that in any case everything (or almost everything) will change in the foreseeable future. One is then forced to distinguish between still unknown, neither observable *future presents* and the *present future*. This means: time itself seems different

¹⁶⁷⁴ Luhmann, *Risk*, 37–38; Niklas Luhmann, *Gesellschaftsstruktur und Semantik: Studien zur Wissenssoziologie der modernen Gesellschaft*, vol. 1 (Frankfurt am Main: Suhrkamp, 1980), chap. 4; Niklas Luhmann, ‘The Future Cannot Begin: Temporal Structures in Modern Society’, *Social Research* 43, no. 1 (1976): 130–131; and Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (New York: Columbia University Press, 2004).

¹⁶⁷⁵ Luhmann, *Risk*, 48.

¹⁶⁷⁶ Luhmann, ‘The Future Cannot Begin’, 137.

¹⁶⁷⁷ Opitz and Tellmann, ‘Future Emergencies’, 111 (emphasis in the original).

¹⁶⁷⁸ ‘Je stärker eine Gesellschaft ihre Zukunft von ihrer eigenen Zukunft abhängig macht, desto intransparenter wird diese Zukunft, weil man ja [...] nicht wissen kann, sondern entscheiden muß, was die Zukunft bringen wird. Zugleich beginnt die Zeit rascher zu fließen; oder zumindestens werden Beschleunigungen notiert. Erwartungen können nicht mehr, wie zuvor, auf Erfahrung stützen’, Luhmann, ‘Risiko und Gefahr’, 148.

¹⁶⁷⁹ ‘If we accept this distinction of the present future and future presents, we can define an open future as present future which has room for several mutually exclusive future presents’, Luhmann, ‘The Future Cannot Begin’, 140.

¹⁶⁸⁰ Luhmann, *Gesellschaftsstruktur und Semantik*, 1:280.

in every present, it moves in time, and *this makes it impossible to find objective criteria for risk assessment and the readiness to assume risk*. One may calculate such criteria and try to justify their consensus - but at the same time, one knows that tomorrow they will be of yesterday".¹⁶⁸¹

In other words, for Luhmann risk is an attempt to deal with the contingency of the future. Like norms, risk connects past, present and future in a specific way. As Oliver Kessler reframes it in Luhmannian terms, risk

"connects the present and the contingent and yet unknown future in so far as the imagination of the future feeds back on actual decisions. Via the contingency of the future, the present itself becomes contingent, which requires that more alternatives are available than can be materialized. Risk, in other words, signifies a highly arrangement of contingencies and thereby also regulates the relationship between the past, the present, and the future".¹⁶⁸²

However, calculations of risk, and the various connected tools of risk management such as the risk factors and indicators of the *Framework of Analysis for Atrocity Crimes*, are bound to fail as it becomes apparent by shifting from first to second-order observation that there does not exist an Archimedian point from where to observe time and calculate the future. This is so because there is no timeless observer of time standing outside of time.¹⁶⁸³ Hence, risk is an ascription and not a 'neutral fact'. Through the semantics of risk the contingent future turns into a present future and can be imagined in different ways. The future is then conceived

¹⁶⁸¹ 'daß das Unwahrscheinliche wahrscheinlicher wird in dem Maße, als sich ohnehin alles (oder doch fast alles) in einer absehbaren Zukunft ändern wird. Man ist dann genötigt, zwischen dennoch unbekannten, weder beobachtbaren künftigen Gegenwarten und der gegenwärtigen Zukunft zu unterscheiden. Das heißt: die Zeit selbst scheint in jeder Gegenwart anders, sie selbst bewegt sich in der Zeit, und das macht es unmöglich, für Risikobeurteilung und Risikobereitschaft objektive Kriterien zu finden. Man mag solche Kriterien errechnen und ihre Konsensfähigkeit zu begründen suchen - aber man weiß zugleich, daß sie morgen von gestern sein werden', Luhmann, 'Risiko und Gefahr', 148 (emphasis in the original).

¹⁶⁸² Kessler, 'Is Risk Changing the Politics of Legal Argumentation?', 869.

¹⁶⁸³ Luhmann, 'Risiko Und Gefahr', 148.

as a *horizon*, more precisely a “temporal horizon of the present” – and therefore, as Luhmann puts it, the “future cannot begin”:

“[T]he essential characteristic of an horizon is that we can never touch it, never get at it, never surpass it, but that in spite of that, it contributes to the definition of the situation. Any movement and any operation of thought only shifts the guiding horizon but never attains it”.¹⁶⁸⁴

The observation that norms and risk are encapsulated in different temporalities as well as Luhmann’s observations of a radically ‘open future’ have important implications for our discussion. For example, we can understand now the struggle between risk and norms, which is also articulated in the emergence of legal risk indicators, as a struggle of ‘conflicting temporalities’¹⁶⁸⁵ and a ‘clash of different temporalities’.¹⁶⁸⁶ As such the politics of international law in world society could increasingly be explored through the lens of temporality. For instance, the struggle between risk and norms can then be studied as a struggle between futurization and defuturization, i.e., between different degrees of an increase or decrease of “the openness of a present future”.¹⁶⁸⁷ This resembles also Mariana Valverde’s problematization of ‘jurisdiction as chronotopes’, i.e., emphasising both the spatial and *the temporal dimension of jurisdiction* and their interplay. Not taking a Luhmannian perspective but rather relying on Foucault, Valverde remarks that “each mode of governance has one or more distinct temporalities”.¹⁶⁸⁸ As such criminal law and risk, on which the *Framework of Analysis for Atrocity Crimes* is build upon, constitute different modes of governance. Valverde nicely captures the different temporalities of criminal law and risk – and the clash of temporalities when both intersect:

“The criminal law and other instruments for punishing wrongs try to ascertain past events and provide a symbolic return to the time before

¹⁶⁸⁴ Luhmann, ‘The Future Cannot Begin’, 139–140.

¹⁶⁸⁵ Opitz, ‘Widerstreitende Temporalitäten’.

¹⁶⁸⁶ Oliver Kessler, ‘World Society, Social Differentiation and Time’, *International Political Sociology* 6, no. 1 (2012): 77–94.

¹⁶⁸⁷ Luhmann, ‘The Future Cannot Begin’, 141. For further discussion see also Opitz and Tellmann, ‘Future Emergencies’.

¹⁶⁸⁸ Mariana Valverde, ‘Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory’, *Social & Legal Studies* 18, no. 2 (2009): 154.

the was committed through punishment ('justice has to be done'). Risk management, by contrast, [...] is oriented to the future, to prevention".¹⁶⁸⁹

Thus, the underlying struggle of conflicting temporalities produces, on the one hand, more uncertainty because it cannot be anticipated whether in a specific situation rationalities based on risk or norms will dominate in the end. Yet, on the other hand, it also produces uncertainty because it creates new hybrids composed of both rationalities, which can lead in the long run to a blurring and "deformation" of traditional legal categories or the emergence of new practices.¹⁶⁹⁰ As, for example, Oliver Kessler and Wouter Werner argue, we can observe now a paradigm shift in the degree of uncertainty: a shift from "structured" uncertainty, which refers to the indeterminacy of every legal system and which is reduced to the stabilization of law through normative expectations, towards "unstructured" forms of uncertainty in the context of risk management, which "enters when the structure-forming capacity of legal categories or distinctions breaks down".¹⁶⁹¹ Finally, as for example Claudia Aradau and Rens van Munster have pointed out, this is reinforced by the introduction of catastrophic elements, i.e. the idea that an event can cause grave and irreversible damages.¹⁶⁹² Although the literature refers in the context of potentially catastrophic futures mainly to terrorism or environmental damages, these new 'politics of catastrophe' certainly apply to the risk that atrocity crimes might occur in the future.

This broader transformation through the simultaneous 'indicatorization' and 'riskification' of legal and law-like categories has important repercussions on questions regarding the authority of experts, jurisdiction and responsibility on a global level. First, the nature of international legal expertise is altered, i.e. different forms of expertise are mobilised and different forms of expertise are silenced. As

¹⁶⁸⁹ Valverde, 154–155. See also Marieke de Goede and Beatrice de Graaf, 'Sentencing Risk: Temporality and Precaution in Terrorism Trials', *International Political Sociology* 7, no. 3 (2013): 313–31.

¹⁶⁹⁰ Luhmann, *Risk*, 168.

¹⁶⁹¹ Oliver Kessler and Wouter Werner, 'Extrajudicial Killing as Risk Management', *Security Dialogue* 39, no. 2–3 (2008): 294.

¹⁶⁹² Aradau and van Munster capture this new form of risk through the notion of 'precautionary risk' (which broadly resembles Kessler and Werner's diagnosis of 'unstructured' uncertainty), Claudia Aradau and Rens van Munster, 'Governing Terrorism through Risk: Taking Precautions, (un)knowing the Future', *European Journal of International Relations* 13, no. 1 (2007): 101; and Aradau and van Munster, *Politics of Catastrophe*.

noted, legal expertise was traditionally bound to past-oriented forms of argumentation, as the task was to translate past and present events into legal categories by relying on evidence and establishing analogies. With the emergence of risk-based rationalities, expertise becomes more future-oriented and it becomes the task of experts to say what will happen.¹⁶⁹³ If lawyers are not able to adapt to these new requirements in forecasting and imagination, more policy-oriented forms of expertise might substitute them. This means, for example, that in order to “take advantage of these quantified vocabularies, one must speak their language”.¹⁶⁹⁴ Moreover, this changes also the nature of evidence, as the standard of proof in courts is usually higher than it is risk-based assessments. While, for example, in the context of terrorism a move towards ‘intelligence-as-evidence’ is visible,¹⁶⁹⁵ it becomes central for legal and non-legal experts in the context of intervention, the responsibility to protect and atrocity crime prevention to solve certain ‘epistemic problems’, namely to ‘know’ what is happening ‘on the ground’ in the catastrophic scenario of a possibly unfolding atrocity crime situation. The question is now who can predict, estimate and assess future risks in the most plausible way. Yet, for instance, in the recent cases of Libya or Syria photographic or video material might be exaggerated or may even lack credibility. Here, indicators such as the *Framework of Analysis for Atrocity Crimes* establish a certain connectivity between the local and the global, where “local vernacular language is typically less influential than more global, technical knowledge”,¹⁶⁹⁶ and serve to ‘govern the world at a distance’.¹⁶⁹⁷ One consequence of the fact that expert knowledge becomes increasingly precarious but has to “maintain myths of control and manageability” is the emergence of organisational anomalies such as what Michael Power has labelled “secondary risk management”, namely that experts do not only deal with the primary risks to which they are assigned to but are “becoming more preoccupied with managing their own risk”.¹⁶⁹⁸ As a result, Power

¹⁶⁹³ dos Reis and Kessler, ‘Constructivism and the Politics of International Law’, 363.

¹⁶⁹⁴ Gordon, ‘Indicators, Rankings and the Political Economy of Academic Production in International Law’, 303.

¹⁶⁹⁵ See de Goede and de Graaf, ‘Sentencing Risk’; and Sullivan, ‘Transnational Legal Assemblages and Global Security Law’.

¹⁶⁹⁶ Merry, *The Seductions of Quantification*, 7.

¹⁶⁹⁷ André Broome and Joel Quirk, ‘Governing the World at a Distance: The Practice of Global Benchmarking’, *Review of International Studies* 41, no. 5 (2015): 819–41.

¹⁶⁹⁸ Michael Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* (London: Demos, 2004), 10, 14. See also de Goede and de Graaf, ‘Sentencing Risk’, 327.

observes “a dangerous flight from judgement and a culture of defensiveness”.¹⁶⁹⁹

Second, it becomes visible that the politics of jurisdiction in international law is also a struggle between different jurisdictional projects based on different temporalities. In particular, future-oriented projects based on risk seem to be more and more successful.¹⁷⁰⁰ At the same time we are dealing with an open future of ‘unstructured’ uncertainty. Jurisdictional projects become then part of a ‘politics of imagination’, i.e. of a politics of how the future could be governed. Different jurisdictional projects imagine and thus ‘colonize’ the future in different ways – and are linked to different projects of biopolitics.¹⁷⁰¹ This is captured by Anne Orford, when she writes that (as already quoted above) the

“risk of international crimes taking place is now posited as the trigger to a broad range of governance and police functions. The jurisdiction of the international community will be triggered by the risk that certain specific crimes may be committed”¹⁷⁰²

In the context of the responsibility to protect the question becomes now which kind of jurisdictional project is seen to represent the international community and thus trusted be able to prevent possible catastrophic events, i.e. “future Kosovos and Rwandas”.¹⁷⁰³

Finally, the meaning of the concept of *responsibility* itself is shifting and the

¹⁶⁹⁹ Power, *The Risk Management of Everything*, 14.

¹⁷⁰⁰ Here, Luhmann is helpful. First, as noted above, Luhmann observes a shift from projects based on normative expectations towards those based on cognitive expectations in the context of the emergence of world society. Second, for Luhmann the oppositional concept of risk is not security but danger. Risk and danger can be distinguished through the question of attribution (and hence agency). Luhmann speaks of risk when a potential loss is attributed to one’s own decision. He speaks of danger, if a potential loss is considered to have been caused externally, i.e. it is attributed to the environment. Importantly, the question of whether something is a risk or danger a question of how it ‘really is’, but a question of (self)attribution. Historically speaking, modern societies tend to substitute danger through risk. Subsequently, risk-based rationalities expand. See Luhmann, *Risk*, 21–22; and Luhmann, ‘Risiko und Gefahr’, 140. This expansion is also noted by Power, *The Risk Management of Everything*.

¹⁷⁰¹ For a further exploration of the biopolitical effects in the context of risk management and humanitarian interventions see, for example, Laura Zanotti, *Governing Disorder: UN Peace Operations, International Security, and Democratization in the Post-Cold War Era* (University Park: The Pennsylvania State University Press, 2011), chap. 4.

¹⁷⁰² Orford, *International Authority and the Responsibility to Protect*, 185.

¹⁷⁰³ Bellamy, ‘Whither the Responsibility to Protect?’, 143.

question becomes of who has the responsibility to protect the future. This implies also that in the context of the responsibility to protect not only the concept of sovereignty is fundamentally redescribed, shifting from sovereignty understood as control towards sovereignty to protect, but that the concept of responsibility itself transforms as well. While traditionally the concept of responsibility is used in international law – and here particularly in international criminal law – to denote the individual responsibility for wrongful acts that one has committed in the past, responsibility refers now to collective wrong-doings that have not occurred yet, but might occur in the future.¹⁷⁰⁴ In other words, we witness a twofold inversion of responsibility. On the one hand, the concept of responsibility shifts from individual to collective responsibility. This represents a break with international criminal law's mantra from the trials in Nuremberg to the politics of recent international criminal courts and tribunals, namely that individuals and not collectives are responsible for international crimes. On the other hand, the temporality of the concept of responsibility changes. While traditionally “the logic of responsibility links unhappy events to *past* behaviour”,¹⁷⁰⁵ it turns now into a responsibility to protect, on state level and international level, of what could happen in a possible future.¹⁷⁰⁶

¹⁷⁰⁴ See, for example, Kessler, ‘World Society, Social Differentiation and Time’, 91; and Kessler and Werner, ‘Extrajudicial Killing as Risk Management’, 296. See also for a conceptual analysis: Hannes Peltonen, ‘Modelling International Collective Responsibility: The Case of Grave Humanitarian Crises’, *Review of International Studies* 36, no. 2 (2010): 239–55.

¹⁷⁰⁵ Kessler and Werner, ‘Extrajudicial Killing as Risk Management’, 296 (emphasis in the original).

¹⁷⁰⁶ A similar shift is visible in the context of anti-terrorism policies where ‘not a past or present event or decision is to be evaluated for which a state or person is held responsible, but a possible future: norms are replaced by the image of instance, of contingency and the unpredictable of future attacks’, Kessler, ‘World Society, Social Differentiation and Time’, 90.

5. Conclusion: Who Represents Humanity? Competing legitimacies, competing temporalities

The aim of this chapter was to reconstruct the politics of jurisdiction in the context of recent debates with regard to humanitarian intervention and the responsibility to protect, which both constitute important streams of 'humanity's law'. Rather than taking the route of many critical scholars and situating these developments within (neo-)colonial and (neo-)imperial politics of Western states,¹⁷⁰⁷ this chapter addressed how jurisdictional projects in the context of the intervention discourse started to develop a future-oriented logic and how this logic also started to change the traditionally past-oriented logic of international law's temporality. Thus, this chapter further inquired into a non-territorial, post-Cartesian, multidimensional and non-exclusive notion of jurisdiction by pointing out that jurisdictional projects do not only have a spatial but also a temporal dimension.¹⁷⁰⁸ In order to study this, I reconstructed various translations within the intervention discourse and how these translations changed international law's focus from an evaluation of the legality of past interventions towards an assessment of the risk that atrocity crimes might happen. Such a future-oriented international law of catastrophic events might then provide thereby a justificatory template for future interventions. In particular, I focussed on two contexts, namely, on the one hand, the before, during and after of NATO's Kosovo action in 1999 and, on the other hand, the implementation process of the responsibility to protect within the United Nations. Yet, I did not intend to reconstruct both in full detail – this has been done numerous times already – and focussed thereby on key episodes, where important translations took place.

In the context of the Kosovo intervention, I argued that Kosovo represented the first fully legalized international conflict as the whole justification and operationalization of the bombings had to be addressed in legal language. It is thus of little surprise that an international expert group, the Independent International

¹⁷⁰⁷ Here, also Anne Orford's point that the responsibility to protect concerns more about the United Nations than the power politics of Western states is important. See Anne Orford, 'In Praise of Description', *Leiden Journal of International Law* 25, no. 3 (2012): 612–613.

¹⁷⁰⁸ See also Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Governance* (Abingdon: Routledge, 2015).

Commission for Kosovo (IICK), was mandated to evaluate the legality of the intervention; yet, the IICK not only evaluated the legality of the intervention – by considering it illegal –, but came to the additional conclusion that the intervention might have been legitimate: ‘illegal but legitimate’. However, the figure of ‘illegal but legitimate’ brought new uncertainty and ambiguity to the international legal discourse as from now on argumentation could permanently oscillate between legality and legitimacy. With these competing legitimacies nearly every form of intervention becomes justifiable.

As an answer to the jurisdictional project of unilateral military action by a regional organisation, the United Nations started to take up the emerging debates about the responsibility to protect in order to (re)gain authority and jurisdiction over issues concerning international interventions. In this context I ‘opened the organizational the black box’ of the United Nations by analysing a number of key documents and thereby highlighting instances of translation, which led in the end to shifts in the temporality of the international legal argument. Here, I illustrated how in particular the UN Secretary-General started to integrate the responsibility to protect into his agenda by, e.g., establishing international expert committees such as the ‘High-level panel on Threats, Challenges and Change’ in 2003. The responsibility to protect was further translated in the context of the 2005 World Summit when protection was linked to protection from ‘genocide, war crimes, ethnic cleansing and crimes against humanity’ – which signified also a hybridization of the responsibility to protect with categories from international criminal law. After the unanimous adoption of the responsibility to protect at that gathering of states, the UN Secretary-General started to further ‘materialize, ‘implement’, ‘mainstream’ and ‘operationalize’ the responsibility, mainly by, on the one hand, establishing the posts of two special advisers (and their ‘joint office’) and, on the other hand, rendering annual implementation reports. In this context the notion of atrocity crimes was taken up as an umbrella term for ‘genocide, war crimes, ethnic cleansing and crimes against humanity’. I pointed out that the notion of atrocity crimes constitutes a perfect ‘black box’ in order to travel within organisations, advance new jurisdictional projects and make the protection dimension of the responsibility to protect measurable, i.e. part of new forms of ‘measurement-driven governance’. In order to illustrate what this means, I

carefully reconstructed one important indicator project in the context of the responsibility to protect: the *Framework of Analysis for Atrocity Crimes: A tool for prevention*, which was published in 2014 by the joint office of the Special Adviser on the Prevention of Genocide and Atrocity Crimes as well as the Special Adviser of the Responsibility to Protect. Importantly, this indicator presents a risk assessment tool in order to evaluate the possibility of future atrocity crimes. My final discussion aimed then to conceptualise and theorize the implications of translating the intervention discourse and in particular categories of international criminal law into a risk indicator. By taking up several discussions in social theory, I argued that the simultaneous ‘indicatorization’ and ‘riskification’ of legal and law-like categories has important repercussions on questions regarding the authority of experts, jurisdiction and responsibility on a global level as, e.g., it might change the authoritative basis of expertise (from traditionally past-oriented lawyers to more future-oriented policy analysts), might facilitate a politics of imagination of an ‘open future’ with different possible biopolitical projects and might blur existing legal categories such as ‘responsibility’ itself as these categories are usually based on a past-oriented logic. In other words, the ‘competing temporalities’ at work seem to have profound effect on the ‘politics of international law’.

Most importantly, however, these competing legitimacies and competing temporalities are anchored in a more profound competition between different jurisdictional projects and the question of who speaks for humanity. Is it the state? A regional organisation? The United Nations in general? The Security Council, General Assembly or Secretary-General in particular? Someone else?

Conclusion

This thesis explored the politics of jurisdiction in international law. In order to do so, it reconstructed jurisdictional projects pursued by scholars and experts, in particular, in the context of an emerging 'humanity's law'. To rely on reconstruction as underlying logic of inquiry means that research is never fully guided and sees a 'fixed' end but that one central task of every research process lies in identifying new problems, new questions and new projects. Hence, I do not limit myself in this brief concluding chapter to only summarize the core findings of this thesis and to bring the various threads together, but I will also provide some pointers for future research.

The introductory chapter set the scene by embedding the thesis in recent discussions about a 'legalization' of world politics and three interrelated shifts within the structure of the international legal argument: the proliferation of international legal expertise and experts, a transformation of the temporality of the structure of the international legal argument by the introduction of future-oriented logics and, most importantly for this thesis, an emerging 'humanity's law'. I argued that an approach based on critical scholarship in two disciplines IR and IL, also labelled as 'politics of international law', as well as reconstruction as logic of inquiry fits best to study these shifts. With regard to reconstruction as logic of inquiry, I specified that this thesis is mainly based on research strategies such as Wittgenstein's 'perspicuous representation' (*übersichtliche Darstellung*), the mapping of arguments and the 'opening of black boxes'. Moreover, I advanced that it might be promising to study the 'politics of international law' by scrutinizing 'projects' – in particular, jurisdictional projects.

The remaining chapters were structured into two parts. Part I (Chapter 2 and Chapter 3) primarily focussed on the (inter-)disciplinary dimension of studying the 'politics of international law'. Here, I argued that it could be more promising to reconstruct various interdisciplinary projects between the two academic fields of IR and IL – i.e., to look how interdisciplinary works –, instead of advancing with a stipulative definition of what interdisciplinary is or should be. My reconstruction of different interdisciplinary projects showed then that these

projects rely on different logics of interdisciplinarity and come with different 'hero figures' different conceptualisations of the 'international' and relate law and politics differently; yet, these logics come also with their specific biases, hierarchies, power relations and exclusionary mechanisms as they negotiate the jurisdiction of academic disciplines differently. I suggested that a way to move on, in particular for critical scholarship in both disciplines, could be in further exploring 'interdisciplinarity as translation' under the confines of a 'culture of argument'. Translation, in the way I use it, does not show us a way out of biases, hierarchies, power relations or exclusionary mechanisms; nor does it set *ex ante* a specific research agenda or provides with specific optics. The aim is not to find a 'joint disciplines of critical scholars. To take 'interdisciplinarity as translation' seriously means rather to take reconstruction as logic of inquiry seriously and identify puzzles, problems and common interests. One of the common interests among critical scholars of both disciplines is the relationship of law, language and (social) world. In order to substantiate this, I reconstructed the scholarly projects of the four critical scholars Onuf, Onuf, Kratochwil, Kennedy and Koskeniemi. All four took the linguistic turn seriously, yet, they tuned differently. For the sake of a sharper analysis I made use of the idea to distinguish a 'performance model' from a 'two worlds model' of language with Kennedy and Kratochwil rather relating to the former and Koskeniemi and Onuf as representatives of the latter. Thus the aim was not to find a new 'joint discipline' of critical scholars but to look at the similarities and differences between these projects in order to make translation possible and identify common problematiques.

Future research with regard to scholarly projects at the intersection of IR and IL could further inquire into the interdisciplinary basis of both disciplines – in conjunction but also separately. While in IL valuable work has been done with regard to the interdisciplinary grounding of international legal positivism and also to some degree to the ethical background of natural law accounts, studies with regard to, for example, sociological approaches and the various policy schools are still rare. To understand the interdisciplinary background of IR seems even more important as IR itself is often seen as a purely interdisciplinary field, i.e. lacking an own (theoretical) core – or, maybe (the promise of) interdisciplinarity is this disciplinary core. In the context of IR, not only international law played an

important role in the history of the field but also, for example, a very specific adaption of systems theory after the Second World War, later the relationship with the field of study of international political economy or, more recently, international political sociology played an important role. To reconstruct how these various interdisciplinary projects played out would help us not only to add a better understanding of the respective disciplinary histories and interdisciplinarity in general but also helps to explain current disciplinary blind spots and the politics of silence involved in the context of many interdisciplinary endeavours (i.e., how interdisciplinarity is written in and out).

Part II (Chapter 4 to Chapter 7) was rather concerned with projects of jurisdiction outside of academia. In order to get a better grounding of the social underpinnings of the politics of jurisdiction, I situated as a first step the thesis within literatures on the 'politics of expertise' in international law. While traditional scholarship in IR and IL separates clearly between politics and expertise, more recent approaches in social theory problematized this dichotomy. Critical scholarship in IR and IL takes up this latter thread and conceptualises politics and expertise as intersecting and two sides of the same coin – as 'politics of expertise'. In addition, these approaches take international law – in particular in the context of broader transformations associated with a constitutionalisation, fragmentation and a turn to managerialism in and of international law – as a specific form of expertise by its own. However, critical scholars conceptualise expertise in different ways and highlight different aspects. I argued that these differences could also be attributed to the different understandings of the relationship of law, language and the (social) world – and that this resonates with my earlier discussion of distinguishing between a 'performance model' and a 'two worlds model' of language. While proponents of a 'two worlds model' stress 'competence' in order to locate expertise, those following a 'performance model' rather stress the 'performativity' of expert work or that expertise is part of a 'form of life'. Moreover, I argued that it might be promising to focus on 'legal technicalities' in order to better grasp the 'politics of expertise' in international law and, here, in particular study jurisdiction as 'legal technicality'. Chapter 5 took the thread up to study jurisdiction as a 'legal technicality'. It did so by pursuing two strategies. Firstly, I reviewed the emerging critical literature on jurisdiction. This

literature points out that jurisdiction is a social and political practices or that we should conceive the spatio-temporal fixes involved in projects of jurisdiction and link it to debates on legal pluralism and a postmodern conception of law. Secondly, I briefly reconstructed the history of jurisdiction by focussing on how a modern notion of jurisdiction, which is linked to exclusivity and territoriality, gradually emerged in the transition from medieval forms of rule to early modern ones. The notion of exclusive territorial jurisdiction lay then the foundation of the modern nation state and the modern international. However, the emerging 'humanity's law' seems to challenge the idea that jurisdiction is exclusive and territorial. In order to be better equipped to study the transformations involved in the emergence of 'humanity's law', I advanced a notion of jurisdiction, which is non-territorial, post-Cartesian, multidimensional and non-exclusive. The final two substantial chapters (Chapter 6 and 7) illustrated what it could signify to explore jurisdictional projects in the context of 'humanity's law' by taking such an understanding of jurisdiction seriously. As a first example, I reconstructed how two international legal experts, Hersch Lauterpacht and Antonio Cassese, pursued jurisdictional projects in the context of the making of international crimes (jurisdiction *ratione materiae*) and thereby attempted to expand the jurisdiction of international criminal law in general. By focussing on these two figures helped me also to highlight how international legal expertise actually works, as international legal experts often occupy different positions within and outside of academia – and have to 'pursue their projects' thus differently. While this example reconstructed 'people with projects', Chapter 7 concentrated rather on 'projects with people'. Concretely, focussed on the broader discourse of humanitarian interventions for humanitarian purposes and explored how the traditionally past-oriented temporality of increasingly intersects with future-oriented logics. This has important implications for the study of jurisdiction as it shows how jurisdictional projects also expand through time by, e.g., taking risk-based rationalities up. Furthermore, both examples highlighted the relevance of 'opening the black box' of jurisdiction in the context of an emerging 'humanity's law' as they point out that struggles over jurisdiction are deeply linked to fundamental questions of global authority and, in the end, of who judges for or represents humanity.

Yet, the exact effects of the politics of jurisdiction in the context of 'humanity's law' need further scrutiny. Here, three avenues for future research seem to be promising. Firstly, more research needs to be done on how jurisdictional projects expand, e.g., by means of new technology: what is the jurisdictional space of the digital? how do jurisdictional projects expand here? how is in particular spatiality, temporality and subjectivity framed (e.g., when it comes to algorithms)?¹⁷⁰⁹ Secondly, one could look at other fields of 'humanity's law' as well as at its boundary of 'humanity's law' to other fields – and how thereby the very idea of 'humanity' is constructed in itself. Within 'humanity's law', e.g., the recent expansion of international human rights law could be explored by scrutinizing the different uses of the concept of human rights (in particular, what counts as human right);¹⁷¹⁰ at the boundary of 'humanity's law' one could, for instance, look at the boundary to the natural and life sciences (biolaw).¹⁷¹¹ Thirdly, this thesis only touched upon the possible biopolitical effects and dark sides of the emergence and proliferation of jurisdictional projects in the context of 'humanity's law' – in particular, as the concept of 'humanity' always bears the danger of a new politics of fundamental exclusion.¹⁷¹² But maybe, by way of conclusion, a reconstruction of the project(s) of 'humanity's law' and the politics of humanity in international law can also be the vantage point for something more positive. Not by finding a better conceptualisation of humanity (and then failing in another attempt of finding a totality) but that a confrontation with the contradictions, blind spots and contingencies of the politics of humanity could start some interesting conversation about new projects of hope, aspiration and solidarity.¹⁷¹³

¹⁷⁰⁹ See already Richard Thompson Ford, 'Law and Borders', *Alabama Law Review* 64 (2012): 123–39.

¹⁷¹⁰ This links also to a discussion of the 'politics of rights'. See, in particular, Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014), chap. 7–8.

¹⁷¹¹ See already Britta van Beers, Luigi Corrias, and Wouter Werner, eds., *Humanity across International Law and Biolaw*, 2014.

¹⁷¹² For a further exploration of the biopolitical effects of risk management in the context of humanitarian interventions see, for example, Laura Zanotti, *Governing Disorder: UN Peace Operations, International Security, and Democratization in the Post-Cold War Era* (University Park: The Pennsylvania State University Press, 2011), chap. 4. Taking a different angle, the most fundamental critique of an invocation of humanity in international politics is probably still: Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 4th ed. (Berlin: Duncker & Humblot, 1997). For an attempt to ground the position of his Doktorvater in conceptual history: Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (New York: Columbia University Press, 2004), 180–191.

¹⁷¹³ In this regard, I always admired the writings of Richard Rorty, for whom the confrontation with the contingency of the human condition never gave reason for pessimism, fear and indifference.

See, for example, Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).

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